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AUGUST 2011 (BI-MONTHLY)

न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

JOTI JOURNAL AUGUST - 2011

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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

Esteemed Readers

The beginning of any journey decides where one wants to go. Likewise, the beginning of life one wants to lead, decides precisely as to what one wants in life. This is the first, fundamental and basic step one has to take in making ones life successful. After deciding first as to what one wants, one gets the maps out and chart out the best route to reach that destination. In this respect one has to read, observe, listen and learn as much as possible about the job, about the route and about what one is after. Knowledge is power and knowledge is strength and knowledge supplies us the know-how. To derive full benefit out of ones knowledge, one must act, work hard and put in sustained effort and thus becoming wiser by experience in the process.

We have to take indefatigable pains and a never-say die attitude to reach the zenith. There is no doubt that the limit of our success and happiness depends upon our thoughts and the way we work. If we give the best to the world the best will come back to us.

As Judges, we should have the thrust for learning as it is a continuous process by which human beings are prepared for the future. Learning refreshes the mind as exercise to the body and we are never too old to learn. It not only gives us knowledge and progress in life but also helps us to develop our attitude and mentality, which ultimately lead us to be good, respectable and understanding human beings.

The task of a Judge is to impart justice as per the Constitutional values. Therefore, every Judge must possess knowledge about the history, socio-economic conditions and their development, the concept of justice underlined in the Preamble of our great Constitution, the Constitutional agenda of the social reforms, which is envisaged in the Directive Principles of State Policy and basic rights of the people given in the Chapter relating to Fundamental Rights and role of the Constitutional functionaries i.e. Legislature, Executive and Judiciary including principle of checks and balance, principles of Natural Justice, equity and conscience, principles of Interpretation of Statutes, law

relating to process of judging and substantial law relating to property rights, matrimonial relations, environmental law, law relating to protection of weaker sections of society, international developments in the field of law etc.

Apart from the above aspects, we have to adhere to certain principles and understand that the Subordinate Judiciary forms the backbone of administration of justice and the legal profession is one of the most respectable professions. All of us in the Judiciary should have a sense of belonging towards this institution. We must uphold the dignity and decorum of the Court and must not do anything that will bring disrepute to the Court. We have to maintain the integrity and sanctity of this institution. We have a responsibility of dispensing justice which should be maintained at all costs. We have to act in accordance with the highest morals and ethics.

The Indian Judicial System is constantly exposed to new challenges, new dimensions and new signals and has to survive in a world in which perhaps the only real certainty is that the circumstances of tomorrow will not be the same as those of today.

The judiciary is not merely like another work place. It is a temple of justice where aggrieved people come when they have lost all hopes from all sides. Hence, the sacrament nature of the court needs to be continually maintained so as to strengthen the faith of the people in this Institution.

Now, coming to the activities of the Institute, in the month of July, Induction Training Programme (First Phase) of four weeks' duration was imparted to the newly appointed Civil Judges Class II of 2011 Batch.

In this Journal, we have, as usual articles in Part I and important judgments of the Hon'ble Supreme Court and High Court in Part II. Part III contains Notification regarding reduction of Stamp Duty chargeable under Article 22 of Schedule 1-A of the Indian Stamp Act, 1899 and also Notification regarding date of enforcement of Indian Stamp (Madhya Pradesh Amendment) Act, 2011.

Now let me end with what Roberta Bondar, an astronaut had said:

"Without knowledge, the world is bereft of culture.
And so we must be educators and students both."

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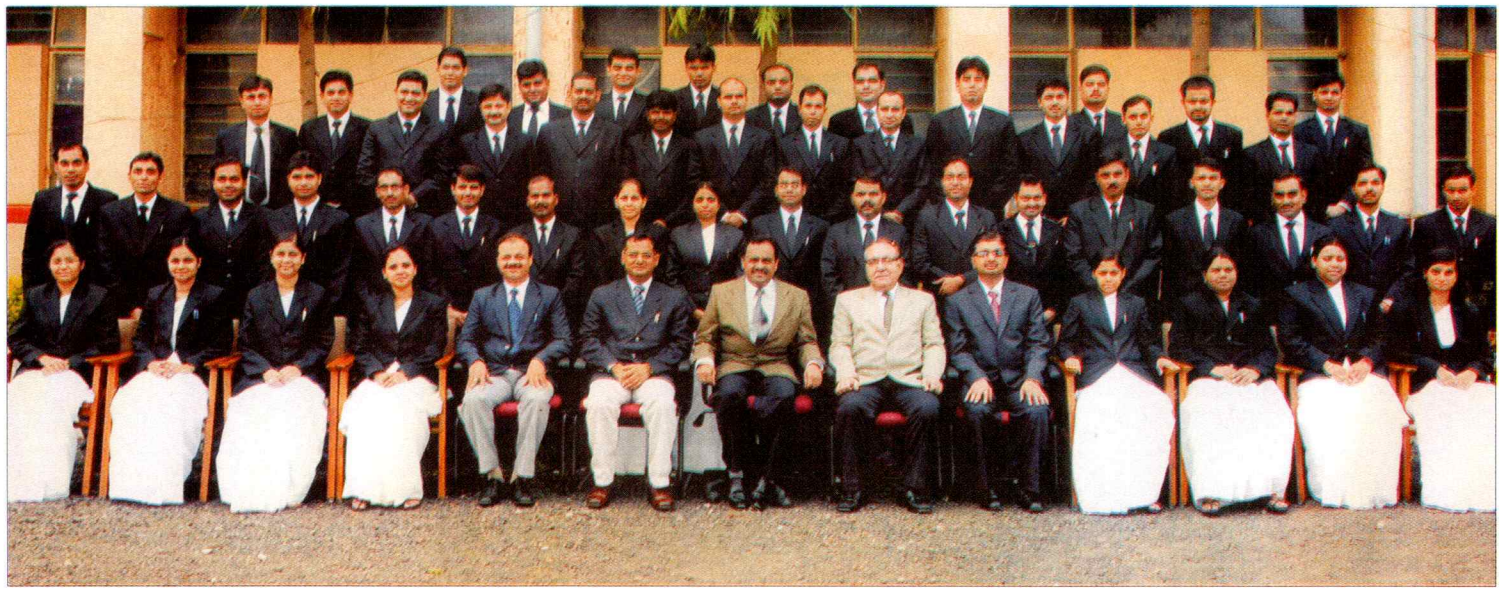
Hosting of the National Flag on Independence Day by
Hon'ble the Acting Chief Justice Shri Sushil Harkauli
in the High Court of Madhya Pradesh, Jabalpur (15.08.2011)

Hon'ble Shri Justice Rajendra Menon, Chairman, High Court
Training Committee addressing the participants in the Inaugural
Session of the Induction Training Programme for the Newly Appointed
Civil Judges Class II of 2011 Batch (11.07.2011 to 06.08.2011)

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE, HIGH COURT OF M.P., JABALPUR



Group Photograph of newly appointed Civil Judges Class II of 2011 Batch during the
First Phase Induction Training Programme held in the Institute from 11.07.2011 to 06.08.2011.
Seated with the participants are Hon'ble Shri Justice Rajendra Menon, Chairman, High Court Training Committee,
Shri J.P. Gupta, Director, JOTRI, Shri Manohar Mamtani, Additional Director, JOTRI,
Shri Ramkumar Choubey, OSD, JOTRI and Shri Awdhesh Kumar Gupta, Deputy Director, JOTRI

PART - I

विद्युत अधिनियम, 2003 के अंतर्गत अपराध के 'शमन' क्षेत्र/विस्तार

न्यायिक अधिकारीगण
जिला उज्जैन एवं गुना

विद्युत अधिनियम, 2003 (अत्र पश्चात् 'अधिनियम') की धारा 152 में विद्युत चोरी के अपराध को शमन करने के प्रावधानों का उल्लेख किया गया है। अधिनियम की धारा 152 (1) में यह भी बताया गया है कि **विद्युत की चोरी के अपराध** को शमन (Compound) करने के संबंध में दण्ड प्रक्रिया संहिता, 1973 की धारा 320 में वर्णित प्रावधान नहीं बल्कि ऐसे अपराध को शमन करने में अधिनियम की धारा 152 के प्रावधान लागू होंगे।

अधिनियम की धारा 152 (1) में **विद्युत चोरी के अपराध** के लिए शमन शुल्क लेकर उचित प्रकरणों में अपराध शमन हेतु प्रावधान है। अधिनियम की धारा 152 (1) अनुसार समुचित सरकार या इस बावत् इसके द्वारा प्राधिकृत कोई अधिकारी किसी उपभोक्ता या व्यक्ति, जिसने इस अधिनियम के तहत दंडनीय **विद्युत चोरी का कोई अपराध** किया है या जो कारित किये जाने के लिए युक्तियुक्त रूप से संदेहास्पद है, इस धारा 152 (1) में उल्लेखित तालिका अनुसार अपराध के शमन करने के रूप में धन की कोई राशि स्वीकार कर सकेंगे। धारा 152 में समुचित सरकार को शासकीय राजपत्र में अधिसूचना द्वारा अधिनियम की धारा 152 (1) की तालिका में विनिर्दिष्ट शमन की दरें संशोधित करने की शक्ति प्रदाय की गई है।

अधिनियम की धारा 152 की उपधारा (1) द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए राज्य सरकार ने अधिसूचना **क्रमांक 4054–4948–2005 xiii दिनांक 30 जून 2006** के तहत धारा 152 (1) की तालिका में वर्णित शमन की दरों को संशोधित किया है, जो इस प्रकार है:–

सारणी

क्रं.	प्रवर्ग	विद्युत अधिनियम, 2003 की धारा 152 में विनिर्दिष्ट राशि	संशोधित दर जिस पर प्रशमन करने के लिए धनराशि प्रति किलोवाट (के.डब्ल्यू)/अश्वशक्ति (एच.पी.) या उसका भाग, निम्नदाब (एल.टी.) की सप्लाई और प्रति किलोवाट एम्पीयर (के.वी.ए.), उच्चदाब (एच.टी.) की सप्लाई के लिए संविदात्मक मांग के अनुसार संग्रहित की जानी है।	
1.	औद्योगिक क्षेत्र	₹ 20,000	10 हार्सपावर तक	₹ 2000 प्रति हार्सपावर और उसका भाग
			10 हार्सपावर से ऊपर तथा 20 हार्स पावर तक	₹ 5,000 प्रति हार्सपावर और उसका भाग

			20 हार्सपावर से ऊपर	₹ 10,000 प्रति हार्सपावर और उसका भाग
2	वाणिज्यक सेवा	₹ 10,000	5 किलोवाट तक	₹ 1000 प्रति हार्सपावर और उसका भाग
			5 किलोवाट से ऊपर	₹ 2500 प्रति हार्सपावर और उसका भाग
3	कृषि सेवा	₹ 2,000	—	₹ 1000 प्रति हार्सपावर और उसका भाग
				अधिसूचना दिनांक 21/8/08 अनुसार संशोधित दर रू. 100 प्रति हार्सपावर और उसका भाग
4	अन्य सेवा	₹ 4,000	—	₹ 1000 प्रति हार्सपावर और उसका भाग

उक्त सारणी के क्रमांक 3 तथा उससे संबंधित प्रविष्टियों के स्थान पर अधिसूचना **क्रं. 5719–4984–2005 xiii दिनांक 21 अगस्त 2008** के द्वारा दिनांक 30 जून 2006 की अधिसूचना मे संशोधन करते हुए कृषि सेवा के लिए ₹ 1000 प्रति हार्सपावर के स्थान पर ₹ 100 प्रति हार्सपावर और उसका भाग निर्धारित किया गया है, जिसका प्रकाशन म.प्र. राजपत्र (असाधारण) दिनांक 21.08.08 पेज नं. 1028 पर किया गया है तथा प्रकाशन दिनांक से संशोधित प्रावधान म.प्र. राज्य में लागू है।

अधिनियम की धारा 152 (1) अनुसार समुचित सरकार या इस बावत् इसके द्वारा प्राधिकृत कोई अधिकारी **विद्युत चोरी के अपराध** में शमन करने के लिए निर्धारित राशि स्वीकार कर सकेंगे। इसी तारतम्य में म. प्र. शासन द्वारा जारी अधिसूचना **क्रमांक – एफ– 1–05–07/13 दिनांक 6 अक्टूबर 2007** जिसका प्रकाशन म. प्र. राजपत्र (पार्ट–1) दिनांक 19/10/09 पेज 2551 पर किया गया है, के द्वारा म. प्र. राज्य विद्युत मंडल या उसका वितरण कंपनी वितरण कंपनियों द्वारा नियुक्त किये गये फ्रेंचाईजी के समतुल्य अधिकारियों को अधिसूचना दिनांक 30 जून 2006 (संशोधित अधिसूचना दिनांक 21.08.08) अनुसार **विद्युत चोरी के अपराध** का प्रशमन करने के लिए निर्धारित राशि स्वीकार करने हेतु अधिकृत किया है, जो इस प्रकार है:–

अ. 15 हार्सपावर तक के समस्त निम्नदाब (लो टेन्शन) संस्थापनों के लिए कार्यपालन यंत्री या फ्रेंचाईजी के संबंध में समतुल्य रैंक का कोई अधिकारी;

ब. 15 हार्सपावर से अधिक के समस्त निम्नदाब (लो टेन्शन) संस्थापनों के लिए अधीक्षण यंत्री या फ्रेंचाईजी के संबंध में समतुल्य रैंक का कोई अधिकारी;

स. समस्त उच्च दाब (हाई टेन्शन) संस्थापनों के लिए मुख्य अभियंता या फ्रेंचाईजी के संबंध में समतुल्य रैंक का कोई अधिकारी।

उक्त अधिसूचना अनुसार अपराध शमन हेतु वर्ग एवं भार अनुसार सक्षम प्राधिकारी एल.टी. हेतु कार्यपालन यंत्री एवं उससे उच्चतर अधिकारी तथा उच्चदाब हेतु अधीक्षण यंत्री या उससे उच्चतर अधिकारी को सक्षम प्राधिकारी नियुक्त किया गया है। फ्रेंचाईजी के समतुल्य अधिकारी भी सक्षम किए गए हैं। इससे स्पष्ट है कि **कनिष्ठ यंत्री** अथवा **सहायक यंत्री** विद्युत अधिनियम, 2003 की धारा 135 (2) के अंतर्गत राज्य शासन द्वारा अधिकृत विद्युत प्रतिष्ठानों के निरीक्षण हेतु सक्षम अधिकारी होते हुये भी अपराध शमन शुल्क स्वीकार करने हेतु सक्षम प्राधिकारी नहीं है।

अधिनियम की धारा 135 से 140 तथा धारा 150 में वर्णित समस्त अपराध अधिनियम की धारा 153 के तहत गठित विशेष न्यायालय के श्रवण क्षेत्राधिकार में है किन्तु इनमें से केवल धारा 135 के तहत विद्युत चोरी का अपराध ही धारा 152 के तहत प्रशमन योग्य अपराध है। धारा 138 में उल्लेखित अपराध प्रथम दृष्टया देखने पर विद्युत चोरी के अपराध का भ्रम उत्पन्न करता है किन्तु वास्तव में यह मीटरों, इंडीकेटर या अन्य यंत्रों को दूषित (tampered) नहीं बल्कि क्षति (injures) कारित करने के साथ–साथ विद्युत प्रदाय को अधिनियम की धारा 56 के तहत विधिवत सूचना देकर काटे जाने पर पुनः अनाधिकृत रूप से संयोजित करने के अपराध के संबंध में है विद्युत चोरी के लिए नहीं। अतः यह स्पष्ट है कि केवल अधिनियम की धारा 135 के तहत विद्युत चोरी की प्रकरण ही शमन योग्य है।

यहाँ पर यह उल्लेख करना आवश्यक होगा कि विद्युत अधिनियम, 2003 के अध्याय 14 में प्रावधानित अपराधों में से स्पष्टतः धारा 135 के अपराध को ही विद्युत की चोरी के अपराध के रूप में प्रावधानित किया गया है। ऐसी स्थिति में धारा 152 के अंतर्गत विद्युत चोरी के अपराध अर्थात धारा 135 के अपराध का ही शमन किया जाना संभव है, धारा 138 अथवा अन्य किसी अपराध का नहीं, परंतु विद्युत की चोरी के अपराध के दुष्प्रेरण के अपराध के संबंध में धारा 152 के अंतर्गत शमन संभावित हो सकता है जिसके संबंध में आगे अलग से विचार किया जायेगा। यदि किसी अशमनीय अपराध से संबंधित मामले की कार्यवाही किसी कारणवश समाप्त किया जाना आवश्यक माना जाता है तो परिवाद अथवा पुलिस रिपोर्ट दोनों ही प्रकार से संस्थित ऐसे मामले को न्यायालय की सम्मति से धारा 321 द.प्र.सं. के अंतर्गत वापस लेने की कार्यवाही की जा सकती है क्योंकि विद्युत अधिनियम की धारा 155 के प्रावधान को देखते हुये जहाँ इस अधिनियम के अंतर्गत इस संबंध में कोई प्रावधान न हो तो वहाँ दण्ड प्रक्रिया संहिता के ऐसे मामले की कार्यवाही के दौरान आवश्यक प्रतीत होते प्रावधानों, जहाँ तक वे इस अधिनियम के उपबंधों के साथ असंगत नहीं हो, का अवलंबन लिया जा सकता है और इसमें कोई वैधानिक बाधा नहीं हैं।

विद्युत चोरी के अपराध का दुष्प्रेरण

अधिनियम की धारा 150 के अनुसार जो कोई व्यक्ति इस अधिनियम के अधीन दंडनीय अपराध के लिये दुष्प्रेरण करता है, भारतीय दण्ड संहिता में अंतर्विष्ट किसी बात के होते हुये भी वह अपराध के लिये उपबंधित दण्ड से दंडित किया जावेगा। धारा 135 के अंतर्गत परिभाषित विद्युत चोरी

के अपराध एवं धारा 150 के उक्त उपबंधों के संयुक्त वाचन से यह स्पष्ट है कि विद्युत चोरी के अपराध का दुष्प्रेरण भी विद्युत चोरी के अपराध के समान दण्डनीय है। अधिनियम की धारा 152 में विद्युत चोरी के दुष्प्रेरण को अभिव्यक्त रूप से शमनीय होना लेख नहीं किया गया है इसलिये यहाँ यह विचारणीय है कि क्या विद्युत चोरी का दुष्प्रेरण भी धारा 152 के अंतर्गत शमन योग्य है अथवा नहीं? क्योंकि द.प्र.सं. की धारा 320 के अंतर्गत भा.द.सं. के ऐसे अपराध जो शमनीय है उनके दुष्प्रेरण से संबंधित अपराध भी शमनीय होना स्पष्ट रूप से अभिव्यक्त किया गया है।

जहाँ तक द.प्र.सं. की धारा 320 (3) के प्रावधानों का प्रश्न है उनके अनुसार जब कोई अपराध उस धारा के अधीन शमनीय है तब ऐसे अपराध के दुष्प्रेरण का, अथवा ऐसे अपराध को करने के प्रयत्न का (जब ऐसा प्रयत्न स्वयं अपराध हो) शमन उसी प्रकार किया जा सकता है। धारा 320 की उपधारा (3) धारा 320 दण्ड प्रक्रिया संहिता की तालिका क्रमांक 1 एवं 2 में वर्णित अपराधों के दुष्प्रेरण से संबंधित है। इस धारा में भारतीय दण्ड संहिता के अंतर्गत परिभाषित अपराधों जो शमनीय है, का उल्लेख किया गया है इसलिये धारा 320 (3) से यह स्पष्ट है कि भारतीय दण्ड संहिता के अंतर्गत परिभाषित अपराधों जो धारा 320 दं.प्र.सं. में शमनीय बताये गये हैं, के दुष्प्रेरण के अपराध का शमन दण्ड प्रक्रिया संहिता के अंतर्गत किया जा सकता है।

दण्ड प्रक्रिया संहिता की धारा 4 के अनुसार जहाँ किसी विशेष अधिनियम में उसमें अंतर्विष्ट अपराधों के संबंध में अन्वेषण, जाँच, विचारण या अन्य कार्यवाही को विनियमित करने के संबंध में उपबंध हो वहाँ दण्ड प्रक्रिया संहिता के उपबंध उपर्युक्त संबंध में लागू नहीं होते हैं। जहाँ विशेष अधिनियम में किसी कार्यवाही के बावत् उपबंधों का अभाव है वहाँ दण्ड प्रक्रिया संहिता के उपबंधों के अनुसार कार्यवाही की जायेगी। परंतु दण्ड प्रक्रिया संहिता में भारतीय दण्ड संहिता के अपराधों के अतिरिक्त अन्य अधिनियमों के अंतर्गत अपराधों में शमन से संबंधित कोई प्रावधान ही नहीं है। ऐसी परिस्थिति में दण्ड प्रक्रिया संहिता की धारा 320 के प्रावधान स्पष्ट रूप से आकर्षित नहीं होते हैं। उनका अवलंबन शमन संबंधी विधि के सामान्य सिद्धांतों के रूप में मान्य करते हुये अन्य विधियों के अस्पष्ट प्रावधानों के संदर्भ में विधायिका के आशय को समझने में लिया जा सकता है।

अधिनियम की धारा 152 के अंतर्गत विद्युत की चोरी का अपराध शमनीय है। धारा 150 के अनुसार विद्युत की चोरी के दुष्प्रेरण का अपराध भी उसी दण्ड जो अधिनियम की धारा 135 के अंतर्गत विद्युत चोरी के लिए विहित है, के लिये दण्डनीय है। तात्पर्य यह है कि विद्युत की चोरी के अपराध का दुष्प्रेरण धारा 135 में परिभाषित विद्युत की चोरी के अपराध से अधिक गंभीर नहीं है। विधायिका ने विद्युत अधिनियम, 2003 के अंतर्गत धारा 152 का प्रावधान करते हुये उसमें धारा 320 द.प्र.सं. के विस्तृत प्रावधान अनुसार मुख्य शमनीय अपराध के साथ ही उसके दुष्प्रेरण के अपराध आदि के संबंध में विस्तृत प्रावधान नहीं किये गये हैं। उपरोक्त परिस्थितियों में विधायिका का आशय देखा जाना उचित होगा, धारा 152 में विद्युत की चोरी के अपराध को शमन करने से संबंधित स्पष्ट प्रावधान को देखते हुये यह माना जा सकता है कि विद्युत की चोरी के अपराध के दुष्प्रेरण का अपराध भी इसमें समाहित रहेगा ऐसा विधायिका का आशय है। ऐसे अपराध के शमन के उद्देश्य को देखते हुये भी

अपराध के दुष्प्रेरण के अपराध का भी इसमें समाहित होना माना जा सकता है। अतः इन परिस्थितियों में यह स्पष्ट है कि विद्युत के चोरी के अपराध के दुष्प्रेरण का अपराध भी अधिनियम की धारा 152 के अंतर्गत शमन योग्य है।

विद्युत अधिनियम, 2003 के प्रभावशील होने के समय पूर्व विद्युत अधिनियम, 1910 के अंतर्गत लंबित मामलों में धारा 152 का प्रभाव

विद्युत अधिनियम, 2003 के प्रभावशील होने के पूर्व भारतीय विद्युत अधिनियम, 1910 के उपबंध प्रभावशील थे। इस अधिनियम की धारा 39 में ऊर्जा की चोरी को परिभाषित करते हुये दण्ड के प्रावधान किये गये थे। विद्युत अधिनियम, 2003 में धारा 39 के स्थान में धारा 135 समाहित करके विद्युत की चोरी के संबंध में उपबंध किये गये हैं। भारतीय विद्युत अधिनियम, 1910 में विद्युत अधिनियम, 2003 की धारा 152 की भांति अपराधों के शमन के लिये कोई उपबंध नहीं थे। नये अधिनियम के द्वारा सन् 1910 के पुराने अधिनियम को निरसित किया गया है। इस परिस्थिति में भारतीय विद्युत अधिनियम, 1910 की धारा 39 के अंतर्गत दण्डनीय अपराध से संबंधित लंबित मामलों एवं अपीलों में नये अधिनियम की धारा 152 के प्रभाव से संबंध में यह विचारणीय है कि क्या इस उपबंध के अंतर्गत लंबित मामलों एवं अपीलों में राजीनामा किया जा सकता है?

विधि के निर्वचन के सामान्य नियम के अनुसार जब तक स्पष्टतया या विवक्षित रूप से अन्यथा उपबंधित न हो प्रत्येक सांविधि (Statute) पूर्वेक्षित अर्थात् भावी (Prospective) प्रभाव रखता है। कानून में उसके भूतलक्षी प्रभाव को दर्शित करने से संबंधित उपबंधों के अभाव में उसे लंबित मामलों पर लागू नहीं किया जा सकता। सांविधि में प्रयुक्त भाषा एवं शब्दावली तथा विधायिका के आशय के अनुसार उसके पूर्वेक्षित या भूतलक्षी प्रभाव के संबंध में निर्वचन किया जाता है। कानून में प्रयुक्त भाषा एवं विधायिका के आशय से स्पष्ट निर्धारण हो सकता है कि वह लंबित मामलों को प्रभावित करती है।

विद्युत अधिनियम, 2003 की धारा 152 में प्रयुक्त शब्दावली स्पष्ट है। शब्दावली इस अधिनियम के अधीन दण्डनीय विद्युत चोरी का अपराध (Offence of theft of electricity punishable under this act) महत्वपूर्ण है, वह विधायिका के आशय को स्पष्ट करती है। उक्त शब्दावली से ही वह स्पष्ट है कि 'इस अधिनियम' अर्थात् विद्युत अधिनियम, 2003 में परिभाषित विद्युत चोरी का अपराध ही धारा 152 के अंतर्गत शमनीय है। इस प्रकार यदि भारतीय विद्युत अधिनियम, 1910 की धारा 39 के अंतर्गत कारित अपराध का विचारण या अपील लंबित है तो उसमें धारा 152 विद्युत अधिनियम, 2003 के उपबंधों के अनुसार राजीनामा नहीं किया जा सकता अर्थात् धारा 152 का प्रभाव भूतलक्षी नहीं है।

अपीलीय प्रक्रम में अपराध का शमन

दण्ड प्रक्रिया संहिता में अपीलीय प्रक्रम में भारतीय दण्ड संहिता के अंतर्गत दण्डनीय अपराध का शमन किये जाने के उपबंध हैं। धारा 320(5) दण्ड प्रक्रिया संहिता के अनुसार जब अभियुक्त विचारणार्थ सुपुर्द कर दिया जाता है या जब वह दोषसिद्ध कर दिया जाता है और अपील लंबित है,

तब अपराध का शमन, यथास्थिति, उस न्यायालय की इजाजत के बिना अनुज्ञात न किया जायेगा जिसे वह सुपुर्द किया गया है, या जिसके समक्ष अपील सुनी जाती है। उक्त उपबंध से यह स्पष्ट है कि भा.दं.सं. के अपराधों जो धारा 320 द.प्र.सं.की दोनों तालिकाओं में शमनीय है, के संबंध में अपील की स्टेज में भी विधिवत् राजीनामा हो सकता है।

दण्ड प्रक्रिया संहिता की धारा 320(5) की तरह के उपबंधों का विद्युत अधिनियम, 2003 की धारा 152 में अभाव है। उसमें अपराध का शमन करने की कोई स्टेज विहित नहीं की गई है। ऐसी स्थिति में धारा 152 विद्युत अधिनियम, 2003 के उपबंधों को केवल मूल प्रकरण के विचारण तक सीमित रखना व उसे अपील के प्रक्रम में लागू न करना उक्त उपबंधों का संकुचित एवं विधायिका के आशय व उद्देश्य के विपरीत निर्वचन होगा। इसके अतिरिक्त अपील मूल विचारण का विस्तार मानी जाती है इसलिये धारा 152 में उक्त आशय के उपबंधों का उल्लेख न होने पर भी विद्युत चोरी तथा उसके दुष्प्रेरण के अपराध का शमन अपीलीय प्रक्रम में भी हो सकता है।

शमन का प्रभाव

अधिनियम की धारा 152(2) के अनुसार उप–धारा (1) के अनुसार धनराशि के भुगतान किये जाने पर उस अपराध के संबंध में अभिरक्षा में निरूद्ध व्यक्ति स्वतंत्र कर दिया जायेगा और किसी दाण्डिक न्यायालय में ऐसे उपभोक्ता या व्यक्ति के विरूद्ध कोई कार्यवाही संस्थित नहीं की जायेगी और न ही जारी रखी जायेगी। इसके आगे उपधारा (3) में उपबंध किया है कि उपधारा (1) के अनुसार किसी अपराध को शमन करने के लिये समुचित सरकार या इस बारे में सशक्त कोई अधिकारी द्वारा स्वीकार की गई कोई धनराशि दण्ड प्रक्रिया संहिता 1973 (2/1974) की धारा 300 के आशय में दोषमुक्ति के बराबर समझी जायेगी।

उपधारा (2) से यह स्पष्ट है कि जैसे ही उपधारा (1) के अनुसार यदि अभियुक्त के द्वारा समझौता शुल्क जमा कर दी जाती है और समुचित सरकार या सक्षम प्राधिकारी के द्वारा वह राशि स्वीकार कर ली जाती है तो अभियुक्त को यदि उसके विरूद्ध कार्यवाही संस्थित है और वह अभिरक्षा में है, तुरन्त अभिरक्षा से मुक्त कर दिया जायेगा भले ही न्यायालय में औपचारिक राजीनामा पेश न किया गया हो। यदि कार्यवाही जारी है तो उस कार्यवाही को आगे जारी नहीं रखा जायेगा। यदि न्यायालय में अभियुक्त के विरूद्ध कार्यवाही संस्थित नहीं की गई थी तो आगे कार्यवाही को संस्थित नहीं किया जायेगा। उपधारा (3) से यह भी स्पष्ट है कि समुचित सरकार या सक्षम प्राधिकारी के द्वारा अपराध का शमन करने के लिये समझौता शुल्क स्वीकार कर लेना दण्ड प्रक्रिया संहिता की धारा 300 के आशय में दोषमुक्ति के बराबर समझी जायेगी अर्थात् उस व्यक्ति का उसी अपराध के लिये पुनः विचारण या दोषसिद्धि नहीं की जा सकती। उक्त उपबंधों से यह स्पष्ट है कि अभियुक्त के द्वारा समझौता शुल्क जमा करने पर सक्षम प्राधिकारी के द्वारा उस धनराशि को स्वीकार किया जाना अपराध के शमन के लिये पर्याप्त है।

अधिनियम की धारा 152(4) में राजीनामा के लिये सीमा निर्धारित की गई है। उसके अनुसार उपधारा (1) के अधीन किसी अपराध को शमन करने के लिये किसी व्यक्ति या उपभोक्ता को केवल एक बार अनुज्ञात किया जायेगा। धारा 152(1) के अंतर्गत राजीनामा एक व्यक्ति के संबंध में केवल एक बार अनुज्ञात किया जा सकता है। यदि एक बार उसके द्वारा जमा किया गया राजीनामा शुल्क स्वीकार किया गया है और पश्चात् में उसके विरूद्ध विद्युत चोरी का अपराध संस्थित किया जाता है या इस संबंध में अन्य कोई अपराध लंबित है तो उसका शमन नहीं किया जा सकता है।

नोट – विशेष उल्लेख

म.प्र. पश्चिम क्षेत्र वि.वि.कं.लि. के अतिरिक्त सचिव के द्वारा दिनांक 07.12.07 को जारी प्रपत्र में विद्युत चोरी के अपराध को प्रशमन करने के बारे में प्रावधान वर्णित किये हैं। यद्यपि यह प्रावधान कंपनी के प्राधिकृत अधिकारियों के लिए है किन्तु विशेष न्यायालय के लिए भी यह प्रावधान नियमानुसार कार्य संपादन करने के लिए उपयोगी है जो निम्न है :–

(A) अपराध के शमन के लिए सर्वप्रथम आवश्यक है कि अभियोगी (कंपनी प्राधिकारी) एवं आरोपी (उपभोक्ता या व्यक्ति जिसने विद्युत चोरी का अपराध किया है या जिसके संबंध में युक्तियुक्त रूप से संदेह है कि उसने ऐसा अपराध किया है) परस्पर अपराध शमन करने हेतु उचित शर्तों पर राजी हों अर्थात दोनों पक्षों की स्वीकृति, अपराध शमन हेतु आवश्यक है। यह कार्यवाही एकपक्षीय नहीं हो सकती।

(B) अपराध शमन हेतु प्रकरण को अधिकृत अधिकारी द्वारा सक्षम प्राधिकारी के समक्ष पेश करना होगा। सक्षम प्राधिकारी की अनुमति लेकर ही अपराध शमन किया जा सकेगा। यह अधिकारी शमन शुल्क स्वीकार करने वाला एकमात्र सक्षम प्राधिकारी है। अन्य कोई नहीं।

(C) सक्षम प्राधिकारी के लिए आवश्यक नहीं है कि वह प्रत्येक प्रकरण में अपराध शमन स्वीकार करें।

(D) अपराध का शमन विशेष न्यायालय में प्रकरण दर्ज करने के पूर्व भी किया जा सकेगा अर्थात ऐसे प्रकरण जिनमें परिवाद दाखिल करने के पूर्व ही अपराध शमन किया गया है को अदालत में प्रस्तुत न किया जावे।

(E) आरोपी व्यक्ति द्वारा अपराध शमन हेतु आवेदन करने पर अधिकृत/निर्धारण अधिकारी को अपने अभिमत सहित प्रकरण सक्षम प्राधिकारी को प्रस्तुत करना चाहिए जिसमें निम्न जानकारी सम्पादित हो।

1. निर्धारण आदेश अनुसार उपभोक्ता/व्यक्ति द्वारा सम्पूर्ण राशि जमा करा दी गई है और कोई भी बकाया राशि शेष नहीं है।
2. उपभोक्ता/व्यक्ति द्वारा पूर्व में किसी अन्य प्रकरण में अपराध शमन सुविधा का उपयोग नहीं किया गया है। (धारा 152 (4))
3. विशेष न्यायालय द्वारा विचाराधीन प्रकरणों में कोई निर्णय नहीं दिया गया है।

(F) सक्षम प्राधिकारी अपराध शमन हेतु प्रस्तुत आवेदन पर विचारोपरांत एतस्मिन पश्चात् उल्लिखित प्रपत्र क्र. 3 में विद्युत शमन शुल्क जमा कराने हेतु आवश्यक सलाह (बैंक संज्ञापन पत्र) संबंधित व्यक्ति को अथवा वह उपलब्ध नहीं हो तो निर्धारण अधिकारी को जारी कर सकेगा। इस कार्य हेतु कृपया ध्यान रहे कि अपराध शमन की कार्यवाही केवल सक्षम प्राधिकारी ही कर सकेगा। सक्षम प्राधिकारी इस कार्य हेतु किसी अन्य अधिकारी को अधिकार प्रत्योजित नहीं कर सकेगा।

(G) विद्युत चोरी के अपराध शमन हेतु प्राप्त किसी भी आवेदन को अस्वीकार करने हेतु भी प्राधिकृत अधिकारी सक्षम होगा यदि उसकी यह राय है कि इसे स्वीकार करने पर कंपनी के हितों पर प्रतिकूल प्रभाव पड़ सकता है।

(H) केवल धारा 135 के प्रकरण को ही अपराध शमन किया जा सकेगा।

(I) अपराध शमन स्वीकार करने की दिनांक को ही एक आदेश जारी किया जायेगा। एतस्मिन पश्चात् उल्लिखित प्रपत्र क्र. (4) अनुसार जारी आदेश के बिना अपराध शमन की प्रक्रिया पूर्ण नहीं मानी जा सकेगी। अपराध शमन स्वीकार करने के पश्चात् विशेष न्यायालय को अपराध शमन स्वीकार करने की सूचना एतस्मिन पश्चात् उल्लिखित प्रपत्र क्र. 5 में प्रेषित करेगा। किन्तु यह सूचना केवल उन्हीं प्रकरणों में भेजी जावेगी जिन प्रकरणों में परिवाद न्यायालय में लंबित है।

(J) अपराध शमन स्वीकार करने की स्थिति में आरोपी व्यक्ति पर किसी भी न्यायालय में प्रकरण जारी नहीं रह पाएगा तथा भारतीय दण्ड संहिता की धारा 300 अनुसार आरोपी व्यक्ति को दोषमुक्त माना जावेगा। (धारा 152 (4))

(K) ऐसे प्रकरण जिनमें विशेष न्यायालय द्वारा कारावास अथवा आर्थिक दण्ड की सजा सुनाई है, अपराध शमन स्वीकार न करे।

(L) शमन शुल्क निर्धारण अधिकारी द्वारा अनंतिम/अंतिम आदेश में नहीं जोड़ा जाना चाहिए तथा सक्षम प्राधिकारी द्वारा तालिका अनुसार निर्धारित राशि के अतिरिक्त अन्य राशि जैसे अभिभाषक शुल्क प्रदाय करने की शर्त, शमन शुल्क स्वीकार करने के पूर्व नहीं लगाई जानी चाहिए।

(M) किसी व्यक्ति/उपभोक्ता को अपराध शमन शुल्क की जानकारी एतस्मिन पश्चात् उल्लिखित निर्धारित संलग्न प्रपत्र क्र. 6 के अनुसार दी जा सकती है।

(N) विद्युत शमन शुल्क की राशि राज्य शासन के मद में जमा की जाती है।

(O) विद्युत चोरी का प्रकरण तब तक समाप्त नहीं माना जावेगा जब तक विद्युत उपभोक्ता द्वारा निर्धारण राशि जमा नहीं करा दी गई हो तथा अपराध शमन शुल्क लेकर सक्षम अधिकारी द्वारा अपराध शमन स्वीकार न कर लिया गया हो। अर्थात विद्युत चोरी (धारा 135) के प्रत्येक प्रकरणों में निर्धारित अपराध शमन राशि जमा किये बिना, सक्षम प्राधिकारी स्तर पर "अपराध खात्मा/शमन" नहीं किए जा सकेंगे एवं विधि अनुसार अन्य सभी विकल्प यथा परिवाद दाखिल करना आदि खुले रहेंगे।

प्रपत्र क्रं. 3

R(43) Sr.No.

M.P. KSHETRA VIDYUT VITARAN COMPANY LTD.....

	Book No.	Sr. No.	Date
Panchanama	/_/_/_/_/_/	/_/_/_/_/	/_/_/_/_/_/_/_/_/

Payable before _____

Name of Consumer/User _____

Address _____

Division: _____

Zone/Dis. Center _____

Group		Diary		Service Conn. No.					

Description		A/C Head	Amount
1.	Consumers contribution towards capital assets (LT)	55.100	
2.	Security Deposit (Non interest bearing)	48.100	
3.	Misc.	62.369	
4.	Energy Charges	23.101	
5.	Electricity Duty	46.300	
6.	Development Cess	46.301	
7.	Meter Cost	61.262	
8.	Compounding fee/Compensation	46.946	
		Total	

Seal*
Authorized/Assessing
Officer

प्रपत्र क्रं. 4

OFFICE OF _____ MPPKVV CO. LTD. _____

No...../...../ .....dtd.....

ORDER

1. Whereas theft of energy was detected vide Panchnama No..... dtd.....in the premises belonging to Shri ..... S/o ..... with a connected load of HP/KW under ..... Category and whereas above person(s) has/ have applied for Compounding If the offense vide their application dated .....in accordance no. 4 & 2 of table therefore, in consideration of the request of the applicants the compounding Notification No.F-1-005/2007/13 Dated 6th OCT. 2007 for which the payment has been made as per notification no. 4054-4948-2005 xiii dated 30th June 2006 as under :-

Rate of Compounding : ₹ ...../- per HP/KW for .....Load

Connected Load : .....HP/KW

Amount paid : ₹ ...../-

MR No. & Date : No.

In accordance with sub-section 152(1), Shri ..... S/o .....shall be set as liberty and no proceeding shall be instituted of continued against such person in any criminal court.

The acceptance of the sum of money for compounding of this offence in accordance with sub-section 152(1), in this behalf shall be deemed to amount to an acquittal within the meaning of section 300 of the Code of Criminal Procedure, 1973.

The Compounding of an offence under sub-section 152(1), shall be allowed only once.

SEAL OF COMPETENT OFFICER

प्रपत्र क्रं. 5

BEFORETHE HON'BLE SPECIAL COURT

Whereas theft of energy was detected vide Pachnama no. .....dtd ..... in the premises belonging to Shri ..... S/o.....who has deposited ₹...../- accepted the compounding vide order no.....date....., therefore, it is requested that in accordance with Section 152 of the Electricity Act, 2003 no proceeding be continued against such person now.

The acceptance of compounding and money receipt is submitted herewith.

SEAL OF COMPLAINANT*

प्रपत्र क्रं. 6

OFFICER OF_____ MPPKVV CO. LTD_____

To,

M/s.....

.....

.....

Sub:- Theft of electricity compounding offence.

Ref:- Pachanama no.....dated .....and.....dated.....

Where theft or electricity has been reported vide Panchanama No..... dated ..... by..... (name & designation of officer)-,..... at your premises and therefore it is proposed to lodge a complaint before the special court u/s 135 of Electricity Act, 2003, therefore it is hereby informed that under the provisions of Section 152 of the Electricity Act, 2003 if you deposit ₹.....@ ₹...../- per HP you shall be beset at liberty and no proceedings shall be instituted or continued against you in criminal court.

SEAL OF COMPLAINANT OFFICER

Copy to :

1. The .....MPPKVVCL.....
2. The .....for necessary action.

SEAL OF COMPLAINANT OFFICER

नोटः— उपरोक्त विशेष उल्लेख के खण्ड (A) से (O) में उल्लेखित प्रावधान एवं प्रपत्र क्रमांक 3 से 6 मध्यप्रदेश पश्चिम क्षेत्र विद्युत वितरण कंपनी इंदौर द्वारा प्रावधानित है लेकिन इनका महत्व अन्य सभी विद्युत वितरण कंपनियों के लिये समान है, जिससे इनको अन्य विद्युत वितरण कंपनियों द्वारा भी यथायोग्य अंगीकृत किया जा सकता है।

निष्कर्ष

विद्युत अधिनियम, 2003 की धारा 152 के अंतर्गत समुचित सरकार अथवा सक्षम प्राधिकारी के द्वारा अधिनियम की धारा 135 के अंतर्गत परिभाषित विद्युत की चोरी व धारा 150 के अंतर्गत विद्युत की चोरी के दुष्प्रेरण के अपराध का शमन किया जा सकता है। अपील के प्रक्रम में भी उनके द्वारा अपराध का शमन हो सकता है। विद्युत अधिनियम के अंतर्गत परिभाषित व दण्डनीय अन्य अपराधों के लिये राजीनामा नहीं किया जा सकता है। विशेष अधिनियम होने के कारण दण्ड प्रक्रिया संहिता की धारा 320 के उपबंध इस विशेष अधिनियम के अंतर्गत उपबंधित अपराधों के शमन के लिये लागू नहीं होते। धारा 152 के उपबंध भारतीय विद्युत अधिनियम, 1910 की धारा 39 के अंतर्गत लंबित दांडिक मामलों एवं अपीलों पर लागू नहीं है इसलिये उनमें इस धारा के अंतर्गत अपराध का शमन नहीं किया जा सकता। समुचित सरकार या सक्षम प्राधिकारी के द्वारा राजीनामा शुल्क स्वीकार कर लेना अपराध के शमन के लिये पर्याप्त है। अपराध का शमन दोषमुक्ति का प्रभाव रखता है। एक व्यक्ति के संबंध में विद्युत चोरी या उसके दुष्प्रेरण के अपराध के लिये केवल एक बार ही राजीनामा हो सकता हैं।

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NATURE AND SCOPE OF SECTION 50 OF N.D.P.S. ACT, 1985

Judicial Officers
Districts Mandsaur & Balaghat*

INTRODUCTION

Narcotic Drugs & Psychotropic Substances Act, 1985 makes stringent provisions to deal with the persons indulging in drug abuse. There are some procedural safeguards in the Act and Rules so that the officials charged with the duty to implement the law may not abuse its provisions so as to harass innocent persons and at the same time, to provide high degree of authenticity to various actions taken by them under it. These safeguards contained in Sections 41, 42, 43 and 50 of the Act, which basically relate to search of places or persons, conducted to effect seizure of illicit drugs or any evidence connected therewith.

To understand the nature and scope of Section 50 of the Act, we would have to first see Section 50, which reads as under:

> *50. Conditions under which search of persons shall be conducted.–*
>
> (1) When any officer duly authorized under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.
>
> (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).
>
> (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.
>
> (4) No female shall be searched by anyone excepting a female.
>
> (5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate proceed, to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973.
>
> (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

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* The articles received from Mandsaur and Balaghat have been compiled and edited.

Thus, sub-section (1) of this section provides that when an officer duly authorized under Section 42 is about to search a person under Section 41, Section 42 or Section 43 he shall, if such person so requires, take him/her to the nearest Gazetted Officer of specified departments or to the nearest Magistrate for being searched in presence of such officer/Magistrate. Under sub-section (2), it is laid down that if such a request is made by the suspected person, the officer who is to make the search may detain the suspect until he can be brought before such Gazetted Officer or the Magistrate. It is manifest that if the suspect expresses the desire to be taken to the Gazetted Officer or the Magistrate, the empowered officer is restrained from effecting the search of the person concerned. He can only detain the suspect for being produced before the Gazetted Officer or the Magistrate, as the case may be. Sub-section (3) lays down that when the person to be searched is brought before such Gazetted Officer or Magistrate and such Gazetted Officer or Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise he shall direct the search to be made. The mandate of Section 50 is precise and clear viz. if the person intended to be searched express to the authorized officer his desire to be taken to the nearest Gazetted Officer or the Magistrate, he cannot be searched till the Gazetted Officer or the Magistrate, as the case may be, directs the authorized officer to do so. Sub-section (4) provides that no female shall be searched by anyone except a female. Clauses (5) and (6) provide that if the officer has reason to believe that it is not possible to take the person to the nearest Gazetted Officer or the Magistrate; without the possibility of the person to be searched parting with the possession of the contraband or related documents, the officer may proceed to search him as provided under Section 100 of Code of Criminal Procedure and after conducting search, such officer shall record the reasons for his belief in this respect and will send a copy thereof to his superior officer within 72 hours.

NATURE

The question as regards applicability of Section 50 of the Act has been discussed in a large number of cases. In view of conflict in the opinions of different Benches as also the difference of opinion between two Judges of Hon'ble Supreme Court in *State of H.P. v. Pawan Kumar, AIR 2004 SC 4735* the question was referred to a larger Bench. A three Judge-Bench of Hon'ble Supreme Court in *State of H.P. v. Pawan Kumar, AIR 2005 SC 2265* relying on the basis of large number of decisions and in particular the decision of the Constitution Bench of Hon'ble Supreme Court in *State of Punjab v. Baldev Singh, (1999) 6 SCC 172* clearly held that Section 50 of the Act would be applicable only in a case of personal search of the accused and not when it is made in respect of some baggage like a bag, article or container which the accused was carrying. In this case the definition of person has been considered and it has been observed:

> "The word 'person' has not been defined in the Act. Section 2 (xxix) of the Act says that the words and expressions used herein and not defined but defined in the Code of

Criminal Procedure have the meanings respectively assigned to them in that Code. The Code of Criminal Procedure, however, does not define the word 'person'. Section 2(y) of the Code says that the words and expressions used therein and not defined but defined in the Indian Penal Code have the meanings respectively assigned to them in that Code. Section 11 of the Indian Penal Code says that the word 'person' includes any company or association or body of persons whether incorporated or not. Similar definition of the word 'person' has been given in Section 3 (42) of the General Clauses Act. .....Therefore, the most appropriate meaning of the word 'person' appears to be - 'the body of a human being as presented to public view usually with its appropriate coverings and clothings'. ..... The appropriate coverings will include footwear also as normally it is considered as essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. ..... Therefore, the word 'person' would mean a human being with appropriate coverings and clothings and also footwear."

Though, in the case of *Namdi Francis Nwaor v. Union of India, (1998) 8 SCC 534* (3-Judge Bench), it was observed that if person is carrying a handbag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50 of the Act, but this case was considered in *Pawan Kumar* (supra) and it was observed that in *Namdi Francis Nwaor case* (supra), no reasons have been given for arriving at the conclusion that search of a handbag being carried by a person would amount to search of a person and that case was decided prior to the Constitution Bench decision in *Baldev Singh* (supra).

Therefore, personal search is distinguishable from the search of baggage or a bag or a handbag or a briefcase or a suitcase or a *jhola* or a thaila or a *gathri* or a *holdall* or a tin box or any article or container or carton etc of varying size, dimension or weight or vehicle or premises of the accused or suspect. This position of law was reiterated in *State of Rajasthan v. Daulat Ram, (2005) 7 SCC 36, State of Haryana v. Ranbir @ Rana, (2006) 5 SCC 167, Kalema Jumba v. State of Maharashra, (1999) 8 SCC 257, Gurbax Singh v. State of Haryana, 2001 Cr.L.J. 1166, Madanlal and others v. State of H.P., (2003) 7 SCC 465, State of Punjab v. Makhan Chand, (2004) 3 SCC 453, State of Haryana v. Suresh, AIR 2007 SC 2245, State of Rajasthan v. Babu Ram, AIR 2007 SC 2018, Balbir Singh v. State of Punjab, AIR SC 3036, Ajmer Singh v. State of Haryana,*

(2010) 3 SCC 746, Abdul Rashid Ibrahim Mansoari v. State of Gujrat, (2000) 2 SCC 513, Union of India and others v. L.D. Balram Singh, (2002) 9 SCC 73, Ghasita Sahu v. State of MP., (2008) 3 SCC 52, State of Rajasthan v. Manoj Sharma and another, AIR 2009 SC 2642 and Jarnail Singh v. State of Punjab, AIR 2011 SC 964 [In case of search of premises, the officer conducting search has to follow the condition under Section 42 of the Act r/w/s 100 of Criminal Procedure Code as laid down in *Ghasita Sahu's* case (supra).]

In cases where recovery has been made from search of a scooter or bag etc. after carrying out the search of the suspect/person, the empowered officer should comply with Section 50, as laid down in the case of *Dilip and another v. State of MP, AIR 2007 SC 369* and reiterated in the case of *Union of India v. Shah Alam, AIR 2010 SC 1785.* In *Dilip* (supra) it was also held that effect of a search carried out in violation of the provisions of law would have a bearing on the credibility of the evidence of the official witnesses, which would of course be considered on the facts and circumstance of each case.

The appraisal of right to the accused is not an empty formality and it should be made in the precise manner and to individual accused persons (where more than one suspect/accused person are to be personally searched) so that they understand the meaning of their impugned right as observed in the case of *Dharamveer Lekhram v. State of Maharashtra, 2001 Cr.L.J 4886 (Bom) and Baburam v. Union of India, 2002 Cr.L.J. 1034 (Raj.).*

SEARCH OF FEMALE

Section 50 (4) provides that no female shall be searched by anyone except a female. This requirement of law is mandatory. As discussed in *Baldev Singh's* case (supra) failure to observe this requirement not only affects credibility of the prosecution case but also is violative of the basic right of a female to be treated with decency and proper dignity. The provision aims at honouring and procuring the modesty of the female and has been held to be mandatory in *State of Punjab v. Indra Rani @ Chhindi, (2000) 10 SCC 429* with the observation that it cannot be diluted even on the grounds that the female was not available at the time of search, which was followed in the cases of *Geeta Bai @ Portable v. State of MP, 2002 (2) EFR 328* and *Fatto @ Phoola @ Kamla Bee v. State of MP 2004 Cr.L J. 4353.*

OPTION/INFORMATION – WHETHER IT CAN BE ORAL?

Sometimes stand is taken before the court that compliance of Section 50 should be made by keeping the option to the accused in writing. This proposition was rejected by the Constitution Bench in *Baldev Singh's* case (supra). In this case it has been laid down that it is not necessary to give information in writing and it is sufficient if such information is communicated to the person concerned orally. This view has been reiterated in *Sajan Abraham v. State of Kerala, (2001) 6 SCC 692 and Gurbaksh Singh v. State of Haryana, (2001) 3 SCC 28.*

RIGHT TO OPT OFFICER, TO WHOM?

There is no further option of being searched in the presence of either a gazetted officer or a Magistrate. The use of "nearest" in Section 50 is relevant. Once he opts, it is for the police officer to decide whether he should be taken for such search before a gazetted officer or a Magistrate depending upon who is conveniently available as held in the case of *Manoharlal v. State of Rajasthan, (1996) 11 SCC 391, Raghubir Singh v. State of Haryana, 1996 CrLJ 1694* and *T.T. Haneefa v. State of Kerala, (2004) 5 SCC 128. In this regard recently in Vijaysinh Chandubha Jadeja v. State of Gujarat, AIR 2011 SC 77* (5-Judge Bench) the Apex Court has also observed as :

> "We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

SEARCH CONDUCTED BY GAZETTED OFFICER

Sometimes question arises whether search conducted by the Gazetted Officer who was a member of the search party and present at the time of search, amounts to compliance of Section 50 or not? It has been held in the case of *Ahmed v. State of Gujarat, (2000) 7 SCC 477* that in such a situation the accused must be given an option under Section 50 and if he opts for the same, then search must be conducted before another Gazetted Officer or Magistrate, otherwise it will amount to violation of Section 50. This question was again considered in the cases of *State of Rajasthan v. Ram Chandra (2005) 5 SCC 151* and *Vijaysinh Chandubha Jadeja's* case (supra). In these cases, law as laid down by the Constitution Bench of the Apex Court in *Baldev Singh's* case (supra) was reiterated and it has been laid down that person conducting search cannot act in the capacity of Gazetted Officer and it is imperative for him to inform the person concerned of his right under Section 50(1) of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search.

CHANCE SEARCH

Now, the question arises that where the search is a chance search or where a police officer is conducting search due to suspicious conduct of the accused, without having any previous knowledge or information about accused having contraband in his possession, whether Section 50 would apply or not? Section 50 categorically lays down that if the search is to be conducted by an officer duly authorized under Section 42 and the search is about to be conducted under the provisions of Sections 41, 42 or 43, the officer concerned does owe a duty

to intimate the person to be searched that if the latter so requires, he would be taken to the nearest Gazetted Officer or to the nearest Magistrate for the purpose of having the search in their presence. But in the event of a situation otherwise, as aforesaid mentioned, question of compliance with the safeguards as prescribed under Section 50 of the Act would not arise, as considered in the cases of *State of Punjab v. Balbir Singh, AIR 1994 SC 1872, Bharat Bhai Bhagavanjibhai v. State of Gujarat, (2002) 8 SCC 327* and *Vikram v. State of M.P., 2002 (3) M.P.L.J. 383.*

THEORY OF 'SUBSTANTIAL COMPLIANCE'/MANNER AND MODE FOR COMPLIANCE?

Now, the question arises whether option given in some particular form or substantial compliance in conformity with the spirit of the provisions of Section 50 (1) will suffice? In *K. Mohan v. State of Kerala, (2000) 10 SCC 222,* it has been held that merely asking the accused whether he requires to be searched in the presence of a Gazetted Officer or a Magistrate does not amount to compliance of Section 50 and that the accused should be informed about his rights to be searched in the presence of the Magistrate or a Gazetted Officer and failure to do so will amount to non-compliance of Section 50. In *Krishna Kanwar (Smt.) @Thakuran v. State of Rajasthan, (2004) 2 SCC 608* the same question was considered and it was held that there is no specific form prescribed or intended for covering the information required to be given under Section 50 and it was held:

> "what is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in the presence of one of the officers named in the section itself. Since no specific mode or manner is prescribed or intended, the Court has to see the substance and not the form of intimation."

However, a different view in this respect is found in *Krishn Mohar Singh Dugal v. State of Goa, (1999) 8 SCC 552.* In this case the accused was asked whether, if he so desired, he could be searched in the presence of Magistrate or Gazetted Officer. He declined to be searched either in the presence of Gazetted Officer or Magistrate. It was held that provisions of Section 50 stood fully complied. In *Joseph Fernandez v. State of Goa, (2000) 1 SCC 707,* which is the decision by three Judge Bench of the Apex Court, it has been laid down that the option given by the police officer in terms that 'if you wish, you may be searched in presence of a Gazetted Officer or a Magistrate' is substantial compliance with the requirements of Section 50. In *Prabha Shankar v. State of MP, (2004) 2 SCC 56,* the following information was conveyed to the accused – "By this notice you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by a Gazetted Officer or by a Magistrate." This was held to be substantial compliance of Section 50.

The Apex Court in *Vijaysinh Chandubha Jadeja's case* (supra) also has considered the "substantial compliance theory" enunciated in *Prabha Shankar's* case (supra) and *Joseph Fernandez* case (supra) and observed that in *Joseph Fernandez* case (supra), the Apex Court did not notice the ratio of *Baldev Singh's* case (supra) and in *Prabha Shankar's* case (supra). *Joseph Fernandez* case (supra) is followed ignoring the dictum laid down in *Baldev Singh's* case (supra). Finally, the Apex Court has held:

> "The object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, *viz.* to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in *Re Presidential Poll, (1974) 2 SCC 33* it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. 'The key to the opening of every law is the reason and spirit of the law, it is the *animus imponentis*, the intention of the law maker expressed in the law itself, taken as a whole.' We are of the opinion that the concept of 'substantial compliance' with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in *Joseph Fernandez* (supra) and *Prabha Shankar Dubey* (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *Baldev Singh's* case (supra)."

The mandate of Section 50 is precise and clear, *viz.* if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so.

In this regard the Constitution Bench in *Baldev Singh's* case (supra) concluded the matter as under:

> "57. (1) That when an empowered officer or a duly authorised officer acting on prior information is about to *search a person*, it is *imperative* for him to *inform* the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
>
> (2) That failure to *inform* the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.
>
> (3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.
>
> xxxx xxxx xxxx xxxx xxxx
>
> (5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.
>
> (6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search."

Although the Constitution Bench did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case if he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him.

OBJECT AND EFFECT OF SUB-SECTIONS (5) & (6) INSERTED BY AMENDMENT

When the authorized officer has reason to believe that any delay in search of the person is fraught with the possibility of person to be searched parting with possession of any narcotic drug or psychotropic substance or article or document, he may proceed to search the person instead of taking him to the nearest Gazetted Officer or Magistrate. However, even in such cases a safeguard against any arbitrary use of power has been provided under sub-section (6). Under the said sub-section, the empowered officer is obliged to send a copy of the reasons, so recorded, to his immediate official superior within 72 hours of the search. The object and the effect of insertion of sub-sections (5) and (6) were considered by the Constitution Bench in the case of *Karnail Singh v. State of Haryana, (2009) 8 SCC 539*

Although in the said decision the Court did observe that by virtue of insertion of sub-sections (5) and (6), the mandate given in *Baldev Singh's case* (supra) is diluted but the Court also opined that it cannot be said that by the said insertion, the protection or safeguards given to the suspect have been taken away completely. The Court observed:

"Through this amendment the strict procedural requirement as mandated by *Baldev Singh case* (supra) was avoided as

relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance with Section 50 by *Baldev Singh case* (supra) was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in *Baldev Singh case* (supra) is diluted."

In *Vijaysinh Chandubha Jadeja's* case (supra), the Apex Court considered the observations made in *Karnail Singh* (supra) and observed that it can, thus, be seen that apart from the fact that in *Karnail Singh* (supra), the issue was regarding the scope and applicability of Section 42 of the NDPS Act in the matter of conducting search, seizure and arrest without warrant or authorisation, the said decision does not depart from the dictum laid down in *Baldev Singh's* case (supra) in so far as the obligation of the empowered officer to inform the suspect of his right enshrined in sub-section (1) of Section 50 of the NDPS Act is concerned. It is also clear from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, sub-section (6) of Section 50 of the NDPS Act makes it imperative and obligatory on the authorised officer to send a copy of the reasons recorded by him for his belief in terms of sub-section (5), to his immediate superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.

It was further observed that although by the insertion of the said two sub-sections, the rigour of strict procedural requirement is sought to be diluted under the circumstances mentioned in the sub-sections, viz. when the authorised officer has reason to believe that any delay in search of the person is fraught with the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance etc., or article or document, he may proceed to search the person instead of taking him to the nearest gazetted officer or Magistrate. However, even in such cases a safeguard against any arbitrary use of power has been provided under sub-section (6). Under the said sub-section, the empowered officer is obliged to send a copy of the reasons, so recorded, to his immediate official superior within seventy two hours of the search. In our opinion, the insertion of these two sub-sections does not obliterate the mandate of sub-section (1) of Section 50 to inform the person to be searched of his right to be taken before a gazetted officer or a Magistrate.

PROOF, PRESUMPTION, NON-COMPLIANCE AND CONSEQUENCES

The compliance of the provisions of Section 50 must be proved by the prosecution and as expounded by the Apex Court in *Saiyad Mohd. Saiyad Umar Saiyad & others v. State of Gujarat, 1995 CrLJ 2662,* there is no room for drawing a presumption on this point in favour of the prosecution under Section 114 Illustration (e) of the Evidence Act. Therefore, substantial compliance of Section 50 should be proved. It is well settled law that evidence of departmental officers, if found trustworthy, can be the basis of conviction without corroboration and non-examination of independent witnesses to search is not always fatal to prosecution. In such cases evidence of witnesses should be scrutinized carefully after applying the rule of caution. In the case of *Ajmer Singh* (supra) it has been laid down that it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. If the police officer is not able to get public witness and Court considers it in the circumstances of the case reasonable and on appreciation, the evidence of the police officer (official witness) is otherwise reliable then it can form the basis of conviction.

Non-compliance may not vitiate the trial as such, but it would cause prejudice to the accused and render the recovery of illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search and vitiate the conviction and sentence of the accused as laid down in the cases of *Baldev Singh, Bharat Bhai* and *Vijaysinh* (supra). In these cases it has also been observed that non-compliance of this mandatory provision can be determined by the court on the basis of the evidence led at the trial and it would not be permissible to cut short a criminal trial on the basis of non-compliance of the provisions of Section 50.

CONCLUSION

With the legal position emerged above, it is crystal clear that the provision of Section 50 of the NDPS Act is mandatory and requires a strict compliance. This provision is applicable only in case of recovery from personal search and not in case of recovery from bag, vehicle, premises etc. as referred above. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded **only** on the basis of the recovery of the illicit article from the person of the accused during such search.

Though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.

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धारा 40 से 44 भारतीय साक्ष्य अधिनियम, 1872 के अधीन निर्णयों की सुसंगतता का क्षेत्र एवं विस्तार

न्यायाधीशगण
जिला सिवनी

विधि का यह सामान्य सिद्धांत है कि किसी भी वाद या कार्यवाही में पूर्व या पश्चात् में होने वाले निर्णय सुसंगत नहीं होते हैं, परंतु भारतीय साक्ष्य अधिनियम, 1872 (जिस अत्र पश्चात् "अधिनियम" लिखकर सम्बोधित किया जा रहा है) की धारा 40, 41, 42, 43, एवं 44 में उन परिस्थितियों का उल्लेख किया गया है, जिनमें ऐसे निर्णय सुसंगत होंगे।

अधिनियम धारा 40 निम्नानुसार उपबंधित करती है :–

> **धारा 40. द्वितीय वाद या विचारण के वारणार्थ पूर्व निर्णय सुसंगत हैं** – किसी ऐसे निर्णय, आदेश या डिक्री का अस्तित्व, जो किसी न्यायालय को किसी वाद के संज्ञान से या कोई विचारण करने से विधि द्वारा निवारित करता है, सुसंगत तथ्य है जबकि प्रश्न यह हो कि क्या ऐसे न्यायालय को ऐसे वाद का संज्ञान या विचारण करना चाहिये।

इस प्रकार से अधिनियम की धारा 40 में वर्णित प्रावधान तब प्रयुक्त होते हैं, जबकि न्यायालय को किसी विषय पर विचार करने का क्षेत्राधिकार प्राप्त होता है, किन्तु एक पक्षकार यह व्यक्त करता है कि न्यायालय के द्वारा उस विषय पर विचार नहीं किया जा सकता, क्योंकि उस विषय को पूर्व में ही निराकृत किया जा चुका है। अतः जब किसी वाद में प्रश्न यह उठता है कि सिविल प्रक्रिया संहिता की धारा 11 में वर्णित प्रांड्न्याय के सिद्धांत को प्रयोग किया जाना चाहिये अथवा नहीं, तब अधिनियम की धारा 40 के अंतर्गत पूर्ववर्ती निर्णय सुसंगत होगा और उस निर्णय को साक्ष्य के रूप में प्रस्तुत किया जा सकता है। इसी प्रकार दण्ड प्रक्रिया संहिता की धारा 300 में वर्णित उपबंध कि एक बार दोषसिद्ध या दोषमुक्त किए गए व्यक्ति का उसी अपराध के लिए विचारण नहीं किया जावेगा, के प्रावधान को लागू किए जाने के संबंध में पूर्व–निर्णय को सुसंगत बनाती है।

माननीय सर्वोच्च न्यायालय के द्वारा न्याय दृष्टांत ***ग्राम पंचायत विरूद्ध उजागर सिंह, (2007) 7 एस.सी.सी. 543*** में अधिनियम की धारा 40 की व्याख्या करते हुए यह स्पष्ट किया है कि धारा 40, द्वितीय वाद या विचारण को वर्जित करने हेतु पूर्ववर्ती निर्णय की सुसंगतता का उपबंध करती है और धारा 11 सिविल प्रक्रिया संहिता से सीधे–सीधे संबंध को स्पष्ट करती है।

न्याय दृष्टांत ***टी. मूसा व अन्य विरूद्ध पुलिस उपनिरीक्षक, वदाकरा पुलिस स्टेशन, एरनाकुलम व अन्य, 2006 क्रि.ला.ज. 1922*** केरल में यह अवधारित किया गया है कि उन्हीं पक्षकारों के बीच हुआ निर्णय अधिनियम की धारा 40 से 43 के अर्थान्तर्गत सुसंगत होता है, ताकि दण्ड प्रक्रिया संहिता की धारा 300 के अधीन विचारण का वर्जन किया जा सके, किन्तु इसका यह अर्थ नहीं है कि

यदि ऐसा निर्णय अधिनियम के अन्य उपबंधों के अधीन अनुज्ञेय होना पाया जाये, तो उक्त निर्णय ग्राह्य नहीं होगा।

न्याय दृष्टांत ***विष्णु दत्त शर्मा विरूद्ध श्रीमती दया सापरा, (2009)13 एस.सी.सी. 729*** में यह अवधारित किया गया है कि चैक के अनादरण के पश्चात् समान वाद हेतुक के संबंध में सिविल एवं दाण्डिक कार्यवाहियों में दाण्डिक प्रकरण में अभियोजन को अभियुक्त के द्वारा अपराध कारित किये जाने के तथ्य को युक्तियुक्त संदेह से परे साबित करना होगा, जबकि सिविल वाद में संभावनाओं की बाहुल्यता के आधार पर वाद को प्रमाणित करना होगा, चूंकि सिविल वाद के संस्थित करने के लिये वाद हेतुक ऋण की मंजूरी था और दाण्डिक कार्यवाही किये जाने के संबंध में चैक की वापसी था, ऐसी दशा में सिविल प्रक्रिया संहिता की धारा 11 में वर्णित प्राड्न्याय का सिद्धांत आकर्षित नहीं होगा, सिविल कार्यवाही में दाण्डिक न्यायालय के निर्णय की सीमित प्रयोज्यता होगी, यदि प्रधानता दाण्डिक कार्यवाही को दी जाती है, तो पूर्ववर्ती संस्थित सिविल वाद का विनिश्चय सिविल वाद में आई साक्ष्य के आधार पर ही किया जावेगा, दाण्डिक कार्यवाही में आई साक्ष्य के आधार पर विनिश्चय नहीं किया जावेगा।

अधिनियम की धारा 41 निम्नानुसार उपबंधित करती है :–

"**धारा 41. प्रोबेट इत्यादि विषयक अधिकारिता के किन्हीं निर्णयों की सुसंगति**– किसी सक्षम न्यायालय के प्रोबेट–विषयक, विवाह–विषयक, नावधिकरण–विषयक या दिवाला अधिकारिता के प्रयोग में दिया हुआ अन्तिम निर्णय, आदेश या डिक्री जो किसी व्यक्ति को, या से, कोई विधिक हैसियत प्रदान करती या ले लेती है या जो सर्वतः न कि किसी विनिर्दिष्ट व्यक्ति के विरूद्ध किसी व्यक्ति को ऐसी किसी हैसियत का हकदार या किसी विनिर्दिष्ट चीज का हकदार घोषित करती है, तब सुसंगत है जबकि किसी ऐसी विधिक हैसियत या किसी ऐसी चीज पर किसी ऐसे व्यक्ति के, हक का अस्तित्व सुसंगत है।

ऐसे निर्णय, ओदश या डिक्री इस बात का निश्चायक सबूत है–

कि कोई विधिक हैसियत, जो वह प्रदत्त करती है, उस समय प्रोद्भूत हुई जब ऐसा निर्णय, आदेश या डिक्री प्रवर्तन में आयी,

कि कोई विधिक हैसियत, जिसके लिए वह किसी व्यक्ति को हकदार घोषित करती है उस व्यक्ति को उस समय प्रोद्भूत हुई जो समय ऐसे निर्णय, आदेश या डिक्री द्वारा घोषित है कि उस समय वह उस व्यक्ति को प्रोद्भूत हुई,

कि कोई विधिक हैसियत, जिसे वह किसी ऐसे व्यक्ति से ले लेती है जो उस समय खत्म हुई जो समय ऐसे निर्णय, आदेश या डिक्री द्वारा घोषित है कि उस समय से वह हैसियत खत्म हो गई थी या खत्म हो जानी चाहिये,

और कि कोई चीज जिसके लिए वह किसी व्यक्ति को ऐसा हकदार घोषित करती है उस व्यक्ति की उस समय सम्पत्ति थी जो समय ऐसे निर्णय, आदेश या डिक्री द्वारा घोषित है कि उस समय से वह चीज उसकी सम्पत्ति थी या होनी चाहिये।''

इस प्रकार धारा 41 में वर्णित प्रावधान तब प्रयुक्त होते हैं, जबकि निर्णय, डिक्री या आदेश किसी सक्षम न्यायालय के द्वारा प्रोबेट विषयक, विवाह विषयक, नावधिकरण विषयक अथवा दिवाला विषयक अधिकारिता के प्रयोग में दिया गया हो। ऐसे निर्णयों को लोकलक्षी (*jus in rem*) निर्णय होना इस धारा में बतलाया गया है। लोकलक्षी निर्णय इस बात के आवश्यक सबूत होते हैं कि–

(1) निर्णय एक विधिक हैसियत प्रदत्त करता है, या

(2) वह किसी व्यक्ति को विधिक हैसियत का हकदार करता है, या

(3) वह यह घोषित करता है कि किसी व्यक्ति की हैसियत जो चल रही थी, वह खत्म हो गई।

धारा 41 के अनुसार कोई ऐसा निर्णय जिससे किसी व्यक्ति को ऐसी हैसियत दी जाती है, वह इस बात का निश्चायक सबूत होगा कि वह व्यक्ति निर्णय में निर्दिष्ट समय पर ऐसा हक रखता है। जब किसी मामले में उसकी हैसियत का प्रश्न उठे तो यह निर्णय सुसंगत होगा। उदाहरणार्थ प्रतिवादी, ''पी'' नामक एक व्यक्ति के प्रति उत्तरदायी था, ''पी'' की मृत्यु पश्चात् ''एक्स'' ने अपने नाम ''पी'' की वसीयत के अंतर्गत प्रोबेट पत्र ले लिया। प्रतिवादी ने ''एक्स'' को वह भुगतान कर दिया, जो उसके द्वारा ''पी'' को किया जाना था, बाद में एक अन्य व्यक्ति जो वादी था, ने यह साबित कर दिया कि जिस वसीयत के आधार पर ''एक्स'' ने प्रोबेट पत्र पाया था, वह कूटरचित थी, जिस पर न्यायालय द्वारा उस वसीयत को रद्द करते हुए वादी को प्रोबेट दे दिया गया, तब वादी ने प्रतिवादी से यह कहते हुए ऋण का भुगतान मांगा की, ''एक्स'' को किया गया भुगतान उसे दायित्व मुक्त नहीं करता था, न्यायालय ने माना कि ''एक्स'' को दिया गया प्रोबेट इस बात का निश्चायक साक्ष्य था कि जब तक वह निर्णय लागू था, ''एक्स'' ही ''पी'' की वसीयत का निष्पादक था और इसलिए ''एक्स'' को किया गया भुगतान प्रतिवादी को दायित्वमुक्त करता था।

न्याय दृष्टांत ***सैय्यद अस्करी हदी अली अगस्टाइन किमाम विरूद्ध राज्य (दिल्ली प्रशासन), ए.आई.आर. 2009 एस.सी. 3232*** में यह अवधारित किया गया है कि जब किसी वसीयत के संबंध में प्रोबेट की कार्यवाही विचाराधीन है और उसी वसीयत को कूट रचित होने के संबंध में आपराधिक कार्यवाही विचाराधीन हो, तो मात्र प्रोबेट की कार्यवाही का विचाराधीन होना आपराधिक कार्यवाही पर कोई प्रभाव नहीं रखता है, परंतु जब प्रोबेट के संबंध में अंतिम रूप से विनिश्चिय दे दिया गया हो, तो उक्त प्रोबेट विषयक अधिकारिता के प्रयोग में न्यायालय द्वारा दिया गया अंतिम आदेश उपरोक्त आपराधिक कार्यवाही में सुसंगत होगा।

अधिनियम की धारा 42 में निम्नानुसार उपबंधित किया गया है :–

> **धारा 42. धारा 41 में वर्णित से भिन्न निर्णयों, आदेशों या डिक्रियों की सुसंगति और प्रभाव**– वे निर्णय, आदेश या डिक्रियां, जो धारा 41 में वर्णित से भिन्न हैं, यदि वे जांच में सुसंगत लोक–प्रकृति की बातों से सम्बन्धित हैं, तो वे सुसंगत हैं। किन्तु ऐसे निर्णय, आदेश या डिक्रियां उन बातों का निश्चायक सबूत नहीं है जिनका वे कथन करती हैं।

इस प्रकार से अधिनियम की धारा 42 उन निर्णयों की सुसंगति का प्रावधान करती है, जो अधिनियम की धारा 41 में वर्णित नहीं है। इस धारा के अनुसार वे निर्णय, आदेश या डिक्रियां जो अधिनियम की धारा 41 में वर्णित निर्णय, आदेश या डिक्रियों से भिन्न हैं, यदि वे सार्वजनिक स्वभाव की बातों से सम्बन्धित हैं, तो वे सुसंगत हैं। किन्तु ऐसे निर्णय, आदेश या डिक्रियां उन बातों का निश्चायक सबूत नहीं है, जिनका वे कथन करती हैं।

न्याय दृष्टांत ***आर. वेंकटाकृष्णन विरूद्ध केन्द्रीय अन्वेषण ब्यूरो, (2009) 11 एस.सी.सी. 737*** में यह अवधारित किया गया है कि बैंक अधिकारियों के द्वारा जनता की धनराशि को निजी व्यक्ति को उपलब्ध कराया गया था, तो तथ्यों को खोजने के लिए जानकीरमन कमेटी के द्वारा दी गई रिपोर्ट तब तक साक्ष्य में ग्राह्य नहीं होगी, जब तक कि तथ्यों को साबित नहीं कर दिया जाता। न्याय दृष्टांत ***आंध्रप्रदेश वक्फ बोर्ड विरूद्ध सैयद जलालुद्दीन शा (मृत) द्वारा विधिक प्रतिनिधिगण, ए.आई.आर. 2005 ए.पी. 54*** में यह अवधारित किया गया है कि वक्फ संबंधी मामले में यदि किसी लोक प्रकृति के अधिकार पर पूर्व निर्णय दिया जा चुका हो, तो पक्षकारों के भिन्न होने पर भी उक्त लोक निर्णय सुसंगत होगा।

अधिनियम की धारा 43 में निम्नानुसार उपबंधित किया गया है :–

> धारा 43. धाराओं 40, 41 और 42 में वर्णित से भिन्न निर्णय आदि कब सुसंगत हैं – धारा 40, 41 और 42 में वर्णित से भिन्न निर्णय, आदेश या डिक्रियां विसंगत हैं जब तक कि ऐसे निर्णय, आदेश या डिक्री का अस्तित्व विवाद्यक तथ्य न हो या व इस अधिनियम के किसी अन्य उपबन्ध के अन्तर्गत सुसंगत न हो।''

इस प्रकार से धारा 43 में एक सामान्य नियम निर्धारित किया गया है, जिसके अनुसार वे मामले जिनमें कि या तो–

1– निर्णय, डिक्री या आदेश अस्तित्व विवादग्रस्त हो, या

2– निर्णय, डिक्री या आदेश साक्ष्य अधिनियम की दूसरी धारा जैसे धारा–11, 13 या 14 के अनुसार सुसंगत हो,

वे इस धारा के अन्तर्गत सुसंगत माने जायेंगे अन्यथा विसंगत होंगे।

माननीय सर्वोच्च न्यायालय ने ***अनिल बिहारी घोष विरूद्ध श्रीमती लतिका बाला दासी, ए. आई.आर. 1955 एस.सी. 566*** में प्रतिपादित किया है कि धारा 263 भारतीय उत्तराधिकार अधिनियम के अंतर्गत प्रोबेट के खण्डन की कार्यवाही में पुत्र द्वारा वसीयतकर्ता–पिता की हत्या किये जाने के प्रश्न के संबंध में, पुत्र को पिता की हत्या के लिए दोषसिद्ध और दण्डादिष्ट करते हुए दण्ड न्यायालय द्वारा दिया गया पूर्व निर्णय निश्चायक सबूत नहीं होगा। दण्ड न्यायालय का निर्णय केवल यह दर्शाने के लिए कि ऐसा विचारण हुआ था और विचारण में दोषसिद्धि और दण्डादेश दिया गया था, के संबंध में ही सुसंगत है।

जहाँ किसी अपराध के लिए कई अभियुक्त का विचारण किया गया था और दोषमुक्त किया गया था वहाँ उसी मामले के फरार घोषित अभियुक्तों के पृथक विचारण में दण्ड न्यायालय का पूर्व निर्णय सुसंगत नहीं है इस संबंध में न्याय दृष्टांत ***राजन राय विरूद्ध स्टेट ऑफ बिहार, ए.आई.आर. 2006 एस.सी. 433*** अवलोकनीय है।

न्याय दृष्टांत ***सेठ रामदयाल जाट विरूद्ध लक्ष्मी प्रसाद, ए.आई.आर. 2009 एस.सी. 2463*** भी अवलोकनीय है जिसमें दण्ड न्यायालय के निर्णय में किया गया विनिश्चय सुसंगत नहीं होने से सिविल वाद में ग्राह्य नहीं माना है। तथापि आपराधिक कार्यवाही में की गई अपराध की स्वीकारोक्ति को अधिनियम की धारा 43 के तहत सिविल वाद में ग्राह्य किया गया है। उक्त प्रकरण के तथ्यों के अनुसार, प्रतिवादी के पास गिरवी रखे गये ₹ 20,000 कीमत के आभूषणों की प्राप्ति हेतु एवं विकल्प में ₹ 20,000 की राशि 12 प्रतिशत वार्षिक ब्याज की दर से दिलाये जाने हेतु वाद प्रस्तुत किया गया था। उपरोक्त वाद की प्रस्तुती से पूर्व वादी के द्वारा प्रतिवादी के विरूद्ध म.प्र. मनीलैण्डर्स एक्ट, 1934 की धारा 3 एवं 4 के तहत सबडिविजनल मजिस्ट्रेट जबलपुर के समक्ष की गई कार्यवाही में प्रतिवादी के द्वारा अपराध को स्वीकार किए जाने से उसे ₹ 150 के अर्थदण्ड से अर्थदण्ड की राशि अदायगी में व्यतिक्रम होने पर 5 दिवस का साधारण कारावास भुगताये जाने आदेशित किया गया था। माननीय सर्वोच्च न्यायालय ने प्रतिवादी द्वारा उपरोक्त आपराधिक कार्यवाही में की गई अपराध की स्वीकारोक्ति को अधिनियम की धारा 43 के सिविल वाद में तहत ग्राह्य अवधारित किया है।

पूर्व निर्णयों की सुसंगतता के बिन्दु पर माननीय सर्वोच्च न्यायालय का न्याय दृष्टांत ***के. जी. प्रेमशंकर विरूद्ध इंस्पेक्टर ऑफ पुलिस, ए.आई.आर. 2002 एस.सी. 3372*** अवलोकनीय है जिसमें माननीय सर्वोच्च न्यायालय ने ***एम. एस. शैरिफ विरूद्ध स्टेट ऑफ मद्रास, ए.आई.आर. 1954 एस.सी. 397*** के अनुसरण में, ***व्ही. एम. शाह विरूद्ध स्टेट ऑफ महाराष्ट्र, ए.आई.आर. 1996 एस.सी. 339*** को नामंजूर (Overrule) करते हुए, धारा 40 से 43 साक्ष्य अधिनियम के अन्तर्गत पूर्व निर्णयों की सुसंगतता के संबंध में विनिश्चय किया है। उक्त निर्णय में माननीय सर्वोच्च न्यायालय ने ***करमचंद गंगा प्रसाद, ए.आई.आर. 1971 एस.सी. 1244 एवं खारकन विरूद्ध स्टेट ऑफ यू. पी., ए.आई.आर. 1965 एस.सी. 83*** को भी विचार में लिया है।

माननीय सर्वोच्च न्यायालय ने ***के. जी. प्रेमशंकर*** (पूर्वोक्त) में अवधारित किया है कि अंतिम रुप से निराकृत पूर्व निर्णय धारा 40 से 43 के प्रावधानों के अंतर्गत अनुसरित किये जाने योग्य हैं। एक ही विषय वस्तु के संबंध में सिविल और दाण्डिक कार्यवाहियों में सिविल न्यायालय का निर्णय, यदि धारा 40 से 43 की शर्तों की संतुष्टि होती है, सुसंगत होगा। लेकिन सिविल न्यायालय का निर्णय, सिवाय धारा 41 के, निश्चायक सबूत नहीं होगा। जहां सिविल कार्यवाही में पारित कोई निर्णय, डिक्री या आदेश धारा 40 एवं 42 या अधिनियम के अन्य प्रावधानों के अंतर्गत सुसंगत है, वहां प्रत्येक मामले में न्यायालय को यह विनिश्चित करना होगा कि किस सीमा तक ऐसा निर्णय, डिक्री या आदेश बंधनकारी या निश्चायक है। उदाहरण के लिए, ख की सम्पत्ति पर क द्वारा अतिक्रमण के प्रकरण में ख द्वारा स्वत्व घोषणा एवं आधिपत्य के लिए संस्थित वाद डिक्री किया गया है। तत्पश्चात् ख द्वारा क के विरुद्ध अतिचार के लिए संस्थित आपराधिक विचारण में सिविल कार्यवाही में पारित निर्णय सुसंगत होगा। प्रत्येक मामले में प्रथमतः यह विचारणीय होगा कि कोई निर्णय, डिक्री या आदेश सुसंगत है, यदि हां तब इसका प्रभाव क्या है। ऐसा निर्णय, डिक्री या आदेश सीमित प्रयोजन से भी सुसंगत हो सकता है।

अधिनियम की धारा 44 में निम्नानुसार उपबंधित किया गया है:–

> **धारा 44. निर्णय अभिप्राप्त करने में कपट या दुस्संधि अथवा न्यायालय की अक्षमता साबित की जा सकेगी** – वाद या अन्य कार्यवाही का कोई (थी) भी पक्षकार यह दर्शित कर सकेगा कि कोई निर्णय, आदेश या डिक्री, जो धारा 40, 41 या 42 के अधीन सुसंगत है और जो प्रतिपक्षी द्वारा साबित की जा चुकी है, ऐसे न्यायालय द्वारा दी गई थी, जो उसे देने के लिए अक्षम था या कपट दुस्सन्धि द्वारा अभिप्राप्त की गई थी।"

इस प्रकार से धारा 44 के अनुसार किसी निर्णय, आदेश या डिक्री के संबंध में यह साबित किया जा सकेगा कि–

1– निर्णय देने वाला न्यायालय अक्षम था, अथवा

2– निर्णय दुस्सन्धि से प्रेरित था, अथवा

3– निर्णय कपट द्वारा प्राप्त किया गया था।

अधिनियम की धारा 44 के प्रावधान को स्पष्ट करते हुए माननीय सर्वोच्च न्यायालय नें न्याय दृष्टांत ***जदुगोपाल विरूद्ध पन्नालाल, ए.आई.आर. 1978 एस.सी. 1329*** में यह अवधारित किया गया कि न्यायालय से कपट द्वारा प्राप्त निर्णय या डिक्री अकृत्य व शून्य होने से न्यायालय या किसी अन्य को आबद्ध नहीं करती है। यदि कोई डिक्री कपट द्वारा प्राप्त की जाती है, तो प्राड्न्याय को प्रश्न उस पर आधारित नहीं हो सकता है। निर्णय को अधिनियम की धारा 44 के उपबंधों के अनुसार कपट द्वारा प्राप्त किया जाना किसी अन्य कार्यवाही में भी साबित किया जा सकता है और उस प्रयोजन के लिए पृथक वाद की आवश्यकता नहीं होती है तथा न्याय दृष्टांत ***एस.पी. चेंगलवाया नायडू विरूद्ध***

जगन्नाथ, (1994) 1 एस.सी.सी. 179 में यह अवधारित किया गया है कि साम्पार्श्विक कार्यवाहियों तक में ऐसे कपट के अनुसार प्राप्त निर्णय के तथ्य को दर्शाते हुए चुनौती दी जा सकती है।

न्याय दृष्टांत *कल्लू व अन्य विरूद्ध अन्तूलाल व अन्य, आई.एल.आर. (2008) एम.पी. 2381* भी उल्लेखनीय है, जिसमें वादीगण के द्वारा विवादित भूमि एवं मकान को अपने पिता के द्वारा वर्ष 1934 में अर्जित किये जाने से उत्तराधिकार के आधार पर अपना स्वत्व बतलाते हुए प्रतिवादीगण के विरूद्ध स्वत्व की घोषणा, आधिपत्य की प्राप्ति हेतु एवं स्थायी निषेधाज्ञा जारी किए जाने हेतु प्रस्तुत किए गए वाद में प्रतिवादीगण के द्वारा विवादित संपत्ति को "जसोदा" के द्वारा उनके पक्ष में की गई वसीयत के आधार पर प्राप्त होना और प्रतिकूल आधिपत्य के आधार पर भी स्वत्व प्राप्त होने का अभिवचन किया गया। इस वाद में प्रतिवादीगण के द्वारा एक अन्य वाद के निर्णय को प्रस्तुत किया गया, जिसमें "जसोदा" के द्वारा उनके पक्ष में की गई वसीयत के आधार पर उनके पक्ष में निर्णय व डिक्री पारित की गई थी, परंतु इस मामले में उक्त अन्य वाद से भिन्न पक्षकार होने से अधिनियम की धारा 40 के अनुसार अन्य वाद के निर्णय व डिक्री को इस वाद में सुसंगत होना नहीं माना गया और चूंकि उक्त अन्य वाद प्रोबेट विषयक, विवाह विषयक अथवा दिवाला विषयक कार्यवाही में पारित नहीं किया गया था, ऐसी स्थिति में अधिनियम की धारा 41 के अनुसार भी उक्त अन्य वाद में पारित किए गए निर्णय एवं डिक्री को इस वाद में सुसंगत होना नहीं पाया गया और चूंकि उक्त वाद में पारित निर्णय व डिक्री लोकलक्षी प्रभाव की नहीं थी, अतः अधिनियम की धारा 42 के अनुसार भी उसे इस वाद में सुसंगत होना नहीं पाया गया और न ही अधिनियम की धारा 43 के प्रावधानों के अनुसार उक्त वाद के निर्णय व डिक्री को सुसंगत होना माना गया।

इस प्रकार से अधिनियम की धारा 40 यह उपबंधित करती है कि यदि कोई निर्णय, आदेश या आज्ञप्ति किसी अनुवर्ती वाद या कार्यवाही के विचारण पर रोक लगाती हो, तो उक्त निर्णय, आदेश या आज्ञप्ति सुसंगत है। अधिनियम की धारा 41 उन निर्णयों से संबंधित है, जिन्हें लोक निर्णय कहा जाता है। अधिनियम की धारा 42 उन निर्णयों की सुसंगति से संबंधित है, जो सार्वजनिक प्रकृति के वाद में दिए गए हों, चाहे उस वाद में वर्तमान वाद के पक्षकार रहे हो या ना रहे हो। अधिनियम की धारा 43 यह उपबंधित करती है कि उन निर्णयों, आदेशों या आज्ञाप्तियों के अतिरिक्त, जिनका उल्लेख अधिनियम की धारा 40, 41 व 42 में किया गया है, अन्य सभी निर्णय, आदेश व आज्ञप्तियां विसंगत होंगी, जब तक कि यह सिद्ध न कर दिया जाये कि साक्ष्य अधिनियम का कोई प्रावधान उन्हें सुसंगत घोषित करता है। अधिनियम की धारा 44 के अनुसार, यदि कोई निर्णय, डिक्री या आदेश जो अधिनियम की धारा 40, 41 अथवा 42 के अंतर्गत सुसंगत है और किसी पक्षकार ने उसे साक्ष्य के रूप में प्रस्तुत किया है, तो दूसरा पक्षकार इस बात का प्रख्यान कर सकता है कि ऐसा निर्णय कपट अथवा दुस्संधि से लिप्त है अथवा अक्षम न्यायालय के द्वारा पारित किया गया है।

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LAW RELATING TO DECIDING SUBSEQUENT BAIL APPLICATIONS

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INTRODUCTION

Article 21 of the Constitution of India which guarantees the right of personal liberty also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law.

The right to claim bail under Section 436 CrPC is an absolute and indefeasible right whereas the position for a person accused of non-bailable offence is entirely different and controlled as per the provisions of Sections 437, 438 and 439 of the CrPC subject to any special provisions in this regard contained in any other special laws for the time being in force such as M.P. Excise Act, 1915, NDPS Act, 1985 etc. Section 437 CrPC deals with the power of the Court other than the High Court and Court of Session with a discretion to release a person accused of or suspected of the commission of any non-bailable offence subject to inbuilt limitations therein. Section 438 (regarding anticipatory bail) and Section 439 (regarding regular bail) deals with the concurrent powers of the High Court and the Court of Sessions with a discretion to release a person accused of the commission of any non-bailable offence subject to the limitations/ conditions provided therein.

Though, under Sections 438 and 439 concurrent power to enlarge bail is given to the High Court and the Court of Sessions but practically, such application for the grant of bail should be filed first before the Court of Session and then the application should be filed before the High Court, if required.

Long back our own High Court in the case of *Daini alias Raju v. State of Madhya Pradesh, 1989 JLJ 323* has held:

> "19. The jurisdiction of High Court and Court of Session under Section 439, Criminal Procedure Code being concurrent, as a matter of practice, the bail applicants are required ordinarily to approach the Court of Session in the first instance and if relief is denied they approach the High Court under Section 439, Criminal Procedure Code itself, not as a superior Court sitting in appellate or revisional jurisdiction over the order of the Court of Session, but because the superior Court can still exercise its own jurisdiction independently, unaffected by the result of exercise by the Court of Session because the latter is an

inferior Court though vested with concurrent jurisdiction. The application seeking bail before the High Court is accompanied by an order of the Court of Session rejecting a similar prayer. The idea is to provide the superior Court with an advantage of apprising itself with the grounds as considerations which prevailed with the Court of Session in taking the view which it did. It has come to my notice in several cases that the first order of the Court of Session rejecting a prayer for bail is a detailed order and when another application is repeated before the same Court, the subsequent order rejects the application simply by stating that earlier application having been rejected on merits, the Court did not see any reason to take a different view of the matter. The latter order is not a detailed one. This subsequent order is filed before the High Court to fulfill the formality but the inevitable consequence is that the High Court is deprived of the opportunity of apprising itself with the reasons which formed foundation for rejection of the prayer by the Sessions Court. The possibility cannot be ruled out that such a course is adopted purposely because the bail applicant does not feel comfortable before the High Court in the presence of a detailed order of the Court of Session rejecting the prayer for bail."

The law of bail dovetails two conflicting interests namely, on the one hand, the requirements of shielding the society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand, absolute adherence of the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty. Even persons accused of non-bailable offences are entitled for bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases, if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the Courts can do so. [See: *Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and another, AIR 2005 SC 921 (3 Judge Bench)*]

JURISDICTION OF SUBSEQUENT BAIL APPLICATION TO WHOM?

Though an accused is not precluded from filing a subsequent bail application for grant of bail but who should hear and decide the subsequent bail application is the main "accident prone zone" where possibility of abuse of process of Court and conflicting views in orders for the same accused person by different Judges may happen or seems to have happened. This is an area where judicial discipline requires to be preserved.

Conceptualizing on the subject of importance in criminal justice system, in *Shahzad Hasan Khan v. Ishtiaq Hasan Khan, AIR 1987 SC 1613,* while dealing with the subsequent bail application, the Apex Court stated that longstanding convention and judicial discipline require that subsequent bail application should be placed before the same Judge who had passed earlier orders. Placing of such matter before the same Judge has its roots in principle as it prevents abuse of process of Court inasmuch as an impression is not created that a litigant is shunning or selecting a Court depending on whether the Court is to his liking or not, and is encouraged to file successive applications without any new factor having cropped up. If successive bail applications on the same subject are permitted to be disposed of by different Judges, there would be conflicting orders and a litigant would be pestering every judge till he gets an order to his liking resulting in the creditability of the court and the confidence of the other side being put in issue and there would be wastage of time of the courts. Judicial discipline requires that such matter must be placed before the same Judge, if he is available for orders.

Again in *State of Maharashtra v. Captain Buddhikota Subha Rao, AIR 1989 SC 2292* restating the above position it was also observed that in such cases it is necessary to act with restraint and circumspection so that the process of the Court is not abused by a litigant and an impression does not gain ground that the litigant has either successfully avoided one judge or selected another to secure an order which had hitherto eluded him. In such a situation the proper course we think, is to direct that the matter be placed before the same learned judge who disposed of the earlier applications. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be conclusive to judicial discipline and would also save time of the courts as a judge familiar with the facts would be able to dispose of the subsequent application with despatch. It will also result in consistency.

In this regard our own High Court has reiterated this principle lucidly in *Daini alias Raju's case* (supra) and summed up judicial system discipline as under:

(a) in view of the decision of the Apex Court in *Shahzad Hassan Khan* (supra), a subsequent application for bail in the same jurisdiction, must be placed before the same Judge (so long as he is available) before whom had come up the earlier application, with whatever result.

(b) A subsequent application for bail must mention all the earlier or pending attempts that were made before the High Court as well as the Court of Session along with their fate.

(c) While moving an application for bail before the High Court, the application ought ordinarily to be accompanied by the order of the Court of Session rejecting the first prayer for bail and containing reasons, unless dispensed with.

(d) A bail petition is expected to incorporate a statement as to all facts and circumstances considered relevant by the applicant in support of his prayer so that whatever is putforth before the Court does not vanish in thin air, but is retained in the record, though there is no format prescribed for bail application; if any statement is likely to be controverted by the opposite party the party would do well to support its statement by an affidavit or documents, as advised.

In the aforesaid case it was also observed that a question may be posed whether these requirements falling within the domain of format or procedural requirements only, laying down rules of discipline only can be treated so imperative as to override the substantive law of bails, negativing the right or privilege for failure of compliance therewith. The requirements have a laudable purpose, principle and policy behind. They have been projected by judicial wisdom founded on judicial experience. The rightful result must be achieved by rightful means. That is the rule of law. If bifocal interests of justice to the individual involved and the society affected are to be secured, if fallacies as to bail jurisdiction are to be removed, nay brightened, if abuse of process of law is to be avoided, and if unwanted practice/tactics are to be curbed; these rules of discipline have to be treated as imperative. A failure to observe them may be destructive of the very purpose sought to be achieved.

Our High Court in *Munna Singh Tomar v. State of M.P., 1990 CrLJ 49* had an occasion to deal with the question whether in view of dictum of the Apex Court in *Shahzad Hasan Khan's* case (supra), a subsequent application for bail was required to be placed before the same Judge before whom an earlier application for bail of the same applicant was dismissed as not pressed, so long as he was available. It was observed that even if the earlier bail application had been **dismissed as withdrawn or not pressed,** a subsequent bail application of the same applicant should be placed for hearing before the same Judge who had rejected the earlier bail application, so long as he was available.

In *Santosh Bhawani Singh v. State of M.P., 2000 Cri. L. J. 1834* the Full Bench of our High Court held that the posting of the subsequent bail applications before the same Bench which had earlier rejected an application, was never considered to be an imperative of law, but this requirement was recognised in view of the long standing convention and judicial discipline as was observed in *Shahzad Hasan Khan's* case (supra).

Finally, in this case reference was answered in affirmative and it was held that the second or successive bail application in a pending appeal or bail application under Section 439 of the Code should be considered by the Bench which has considered the first bail application unless the Bench which decided the earlier application, is not available for a sufficient duration.

Looking to the importance of jurisdiction regarding subsequent bail applications, ultimately our High Court has specifically made provision under High Court of Madhya Pradesh Rules, 2008. Rule 15 of High Court of M.P. Rules, 2008 reads as under:—

> *Subsequent applications for bail.*- All subsequent applications under Sections 389(1), 438 and 439 of the Code of Criminal Procedure, 1973, shall be listed before the same Judge/bench who/which had decided the first application, even if earlier application was dismissed for want of prosecution, or dismissed as not pressed or withdrawn.

The provision of Rule 15 in contrast with Rule 22 of above Rules, 2008 was challenged on judicial side but Full Bench of our own High Court in *Ram Pratap v. State of Madhya Pradesh, 2010 Cri. L. J. 4582* rejected the objections in this regard and observed that apparently Rule 15 is based on epoch-making decision of the Supreme Court in *Shahzad Hasan Khan's* case (supra), mandating that the subsequent bail applications must be placed before the same Judge who had passed the earlier orders and who was available. However, we are not required to discuss ramifications of the guidelines laid down in *Shahzad Hasan Khan's case* (supra) as corresponding opinions have already been well set out by as many as three Full Benches of this Court respectively in *Narayan Prasad v. State of M. P., 1993 MPLJ 1, Santosh v. State of M.P., 2000 (1) MPLJ 354* and *Gopal v. State of M. P., 2004 (4) MPLJ 238.*

So far subordinate Courts are concerned, these principles by way of some illustrations, though not exhaustive, may be clarified as under: –

(i) If one bail application of an accused 'A' is decided by a competent judge 'B', then all subsequent bail applications of accused 'A' in that particular case should be decided by the same Judge 'B' so long he is available in the same Sessions Division.

(ii) If any bail application of accused 'A' is decided by a Judge 'B' as incharge of Judge 'C' who is on leave or absent from his headquarters and after some time a subsequent bail application of the accused 'A' is filed in the same case, then it should be decided by the Judge 'B' and not by 'C'.

(iii) If any bail application of an accused 'A' is heard by a Judge 'B', but that has been dismissed as withdrawn or not pressed, a subsequent bail application of the same accused 'A' in that case should be placed for consideration before the same Judge 'B' so long as he is available in the same Sessions Division.

(iv) If a bail application of accused 'A' has been decided by Judge 'B' and on presentation of subsequent bail application for accused 'A', Judge 'B' is not available for sufficient duration, then such subsequent bail application may be decided by another competent Judge 'C' who is incharge Judge of that Court in absence of Judge 'B'.

(v) If one bail application of an accused 'A' is decided by a Judge 'B' and subsequent bail application is filed by accused 'A' after his criminal case is transferred or is made over for trial to the Judge 'C' then such subsequent bail applications should be heard and decided by Judge 'C' so long he is available because the previous Judge 'B' ceases to exercise jurisdiction over such bail application inspite of rejection of earlier application by that Judge 'B'. [See-*State of M.P. v. Chandrahas, 1991 MPLJ 779*]

(vi) If in a criminal case bail application of accused 'A' is decided on merits or dismissed as withdrawn or not pressed by the superior Court or Judge, then subsequent bail application of accused 'A' in that case should be decided by the same superior Court or Judge. Such subsequent bail application of accused 'A' should not be decided by the subordinate Court; Court of Session or Magistrate as the case may be.

(vii) When the superior Court has refused to grant bail to an accused on merits of the case and that order remained in force, judicial discipline and propriety requires the subordinate criminal Court not to entertain an application for bail from such accused unless the superior Court has either permitted the accused to move again before the subordinate criminal Court or, the case is one covered by the sub-clause (a) of the proviso to Section 167(2) of the Code. [See-*Ajay Raj v. State of Kerala, 2010 CriLJ 534*]

(viii) In *Smt. Bimla Devi v. State of Bihar and others, 1994 Cri LJ 638* the Magistrate granted bail in spite of its rejection on two earlier occasions by the High Court. The Supreme Court observed in para 2 of the judgment,

> "in view of the fact that the Judicial Magistrate at a later stage has himself cancelled the bail, it is not necessary for us to pass any order with regard to the petitioner's prayer for cancellation of bail but the disturbing feature of the case is that though two successive applications of the accused for grant of bail were rejected by the High Court yet the learned Magistrate granted provisional bail. The course adopted by the learned Magistrate is not only contrary to the settled principles of judicial discipline and propriety but also contrary to the statutory provisions."

(ix) If first bail application of an accused 'A' and 'B' is decided on merits by Judge 'C' and thereafter a bail application of accused 'B' is allowed by the Superior Court under same facts and circumstances, then on the ground of parity, second bail application of accused 'A' may be considered by the Judge 'C' on the basis of the grounds on which bail application of accused 'B' has been allowed by the Superior Court.

(x) There are three accused persons 'A', 'B' and 'C' but bail application is filed only by accused 'A' and 'B', which is rejected on merits by Judge 'D' and thereafter a bail application of accused 'B' is allowed by the Superior Court under same facts and circumstances, then on the ground of parity, first bail

application of accused 'C' may be considered by the Judge 'D' on the basis of the grounds on which bail application of accused 'B' has been allowed by the Superior Court even on same grounds Judge 'D' had rejected first bail application of another accused 'A'.

(xi) Where a bail application of an accused 'A' is rejected by trial Judge on merits of the prosecution case and during his trial, material prosecution witnesses have turned hostile, even then the trial Judge cannot allow the subsequent bail application of accused 'A' only on that ground as hostility of prosecution witnesses in trial cannot be considered substantial change in the facts and circumstances of the case for the trial Judge. Even the superior Court also cannot grant bail on sole ground of hostility of prosecution witnesses because principles of granting bail in non-bailable offence are well settled and Court or Judge cannot go into the question of credibility and reliability of the witnesses put up by the prosecution as this can only be tested during the trial. [See- *Satish Jaggi v. State of Chhattisgarh, 2007 CriLJ 2766*]

(xii) Further, in an application under Section 439 CrPC full particulars of the person or persons be given from whom, the counsel of the applicant has received written instructions to file the application clearly indicating the number with results of the earlier applications moved on behalf of the accused. [See *State of M.P. v. R.P. Gupta, 2000 (1) MPJR 185*]

(xiii) In *Munni Devi v. Sessions Judge, Gwalior, 1993 MPLJ 310,* it has been held that the Court would be well to insist that every bail application discloses on its face whether the application is the first application or the second application or the third application etc. And in every case the applicant is directed to furnish the name of the Judge who may have rejected the earlier bail application. If these particulars are not given in the first instance, the Judge should insist that particulars be given and then only a notice be issued to the District Magistrate or the Government Pleader, as the case may be. This is the only step which can prevent the hearing of a bail application by a Judge other than the Judge who had earlier rejected it.

(xiv) It will also be useful to refer here the directions to be followed as given by our High Court in *V.P. Shrivastava v. State of M.P., 2000 (I) MPJR 612,* while entertaining a bail application under Section 438 CrPC. In this case it was held that an application under Section 438 (1) CrPC has to be supported by an affidavit of the applicant or by a family member or a friend or a pairokar who has been duly authorised by the applicant. Authorisation should be filed alongwith affidavit.

PRINCIPLES FOR CONSIDERING SUBSEQUENT BAIL APPLICATION

The principles of *res judicata* and such analogous principles although are not applicable in a criminal proceeding, still the Courts are bound by the doctrine of judicial discipline. The findings of a higher Court or a Bench of co-ordinate bench strength must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier.

Though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. What is required to be seen while considering the successive bail application is mainly whether any new facts or circumstances which were not prevalent when the first application was filed are in existence so as to practically allow the Court to review or reconsider its earlier order of rejection of bail. Ordinarily, the issues which had been canvassed earlier would not be permitted to be re-agitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting. This is the limited area in which an accused who has been denied bail earlier can move a subsequent application.

In regard to cases where earlier bail applications have been rejected there is a further onus on the Court to consider the subsequent application for grant of bail by noticing the grounds on which earlier bail applications have been rejected and after such consideration if the Court is of the opinion that bail has to be granted then the said Court will have to give specific reasons why in spite of such earlier rejection the subsequent application for bail should be granted. [See *Ram Govind Upadhyay v. Sudarshan Singh and others, (2002) 3 SCC 598* and *Kalyan Chandra Sarkar v. Rajesh Ranjan, AIR 2004 SC 1866*].

But without the change in the circumstances the second application would be deemed to be seeking review of the earlier judgment which is not permissible under criminal law as has been held by the Apex Court in *Hari Singh Mann v. Harbhajan Singh Bajwa, (2001) 1 SCC 169.*

CONCLUSION

As discussed above the law for deciding subsequent bail application is well settled and there are least possibilities of misuse of due process of court if the concerned Judge, who entertaining subsequent bail application is vigilant about his jurisdiction, the particulars of previous bail applications which are essentially to be mentioned in subsequent bail application and insisting for submission of previous bail order for perusal to consider grounds on which previous bail application was decided and new grounds emerged thereafter, if any, to avoid judicial indiscipline. And when we speak of change, we mean a substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. A subsequent bail application without the change in the circumstances would be deemed to seek review of the earlier order, which is not permissible under the criminal law.

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PART - II

NOTES ON IMPORTANT JUDGMENTS

191. ACCOMMODATION CONTROL ACT, 1961 (M.P) – Sections 12, 12 (1) (a) and 12 (1) (c)
EVIDENCE ACT, 1872 – Section 116
Challenge as to title of landlord – Defendant after admitting the relationship as tenant is estopped from challenging the title of the landlord.
Arrears of rent – Appellant did not deposit the rent while it was known to him that he was the tenant in the disputed accommodation – Decree on the ground of arrears of rent cannot be said to be illegal.
Decree for eviction – In the absence of proof of relationship as landlord and tenant, on the strength of the title, the decree for eviction could be passed in favour of the landlord.

Sabir Mohd. v. Maganlal
Judgment dated 15.12.2010 passed by the High Court of M.P. in S.A. No. 527 of 1999, reported in ILR (2011) M.P. 1243

Held:

The admissions of the principal defendant in his written statement and also the admission by Mohd. Sabir in his deposition admitting the tenancy of the appellant, by virtue of the provision of Sections 21 and 58 of the Evidence Act, is binding against him, therefore in any case, after admitting, the relationship as tenant of the respondent or his father the appellant is estopped to challenge the title of such respondent landlord but it is apparent from the written statement and the deposition of the appellant that inspite having knowledge of the aforesaid relationship and right of the respondent, the appellant has denied the same and thereby challenging the title of the respondent, the appellant has become nuisance in such premises for the respondent. Therefore the impugned decree under Section 12 (1) (c) could not be held to be contrary to law.

It is also apparent on record that, at any point of time, either before filing the suit or in pendency of the suit, in both the innings, as per findings of the subordinate appellate court, no dues of the rent was deposited by the appellant while it was known to him that he was the tenant at the rate of ₹ 20 per month in the disputed accommodation inspite it he has committed default in that regard therefore, in view of the law laid down by the Apex Court in the matter of *Jamnalal and others v. Radheshyam, (2000) 4 SCC 380,* the impugned decree on the ground under Section 12 (1)(a) of the Act could not be said to be illegal or contrary to any law.

If it is deemed that the respondent could not establish the relationship of the landlord and tenant between him and the appellant and only admitted the title and the ownership of the respondent with respect of the disputed property

even then in view of the principle laid down by the Apex Court in the matter of *Bhagwati v. Chandramaul, AIR 1966 SC 735,* in the lack of proof of relationship as landlord and tenant, on the strength of the title, the decree for eviction could be passed in favour of the landlord. Such principle was laid down by the Apex Court in the following manner :-

> "In a suit for ejectment the defendant admitted the title of the plaintiff in regard to the plot and pleaded that he was to remain in possession of the house until the amount spent by him in its construction was returned by the plaintiff. The plaintiff led evidence about the tenancy set up by him and the defendant led evidence about the agreement on which he relied. Both the pleas were clear and specific and the common basis of both the pleas was that the plaintiff was the owner and the defendant was in possession by his permission. In such a case the relationship between the parties would be either that of a landlord and tenant, or that an owner of property and a person put into possession of it by the owner's licence. No other alternative was logically or legitimately possible.
>
> Held that in absence of proof of tenancy and of defendants agreement the conclusion of the High Court in first appeal that the defendant was in possession of the suit premises by the leave and licence of the plaintiff, did not cause prejudice to defendant. There was no error of law if the decree for ejectment was passed. F.A. No. 564 of 1958 dated 14.12.1962 (All.) affirmed"

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192. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 8, 11, 34 and 48
TRANSFER OF PROPERTY ACT, 1882 – Section 6
SPECIFIC RELIEF ACT, 1963 – Section 34

(i) In an application under Section 8 of the Arbitration and Conciliation Act, 1996, in pending suit, the Court has to decide all aspects of abitrability of the dispute even if arbitration agreement exists between the parties – If the subject matter of the suit is capable of adjudication only by a public forum or relief claimed can only be granted by a Court or Tribunal, the Court may reject such application – Issues to be decided by Court prior to referring disputes to arbitration – Enumerated.

(ii) Not only filing of the written statement in a suit, but filing of any statement, application, affidavit by a defendant prior to the filing of the written statement will be construed as "submission of a statement on the substance of the dispute", if by filing such

statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waives his right to seek reference to arbitration – But filing of a reply by a defendant, to an application for temporary injunction/ attachment before judgment/appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him.

(iii) An agreement to sell or an agreement to mortgage does not involve any transfer of right *in rem* but creates only a personal obligation. Therefore, if specific performance is sought either in regard to an agreement to sell or an agreement to mortage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right *in rem*. A mortgage suit for sale of the mortgaged property is an action *in rem*, for enforcement of a right *in rem*. A suit on mortgage is not a mere suit for money – A suit for enforcement of a mortgage being the enforcement of a right *in rem*, will have to be decided by the courts of law and not by Arbitral Tribunals – Even in a mortgage suit bifurcation of arbitral/non-arbitral issues is not permissible – Such mortgage suit has to be adjudicated as a whole.

Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and others

Judgment dated 15.04.2011 passed by the Supreme Court in Civil Appeal No. 5440 of 2002, reported in (2011) 5 SCC 532

Held :

Where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under Section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide:

(i) whether there is an arbitration agreement among the parties;

(ii) whether all the parties to the suit are parties to the arbitration agreement;

(iii) whether the disputes which are the subject-matter of the suit fall within the scope of arbitration agreement;

(iv) whether the defendant had applied under Section 8 of the Act before submitting his first statement on the substance of the dispute; and

(v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration.

The nature and scope of issues arising for consideration in an application under Section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under Section 8 of the Act, seeking reference of

the parties to a suit to arbitration. While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of "arbitrability" or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the awad by filing an application under Section 34 of the Act, relying upon sub-section (2)(b)(i) of that section.

But where the issue of "arbitrability" arises in the context of an application under Section 8 of the Act in a pending suit, all aspects of arbitrability will have to be decided by the court seized of the suit, and cannot be left to the decision of the arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject-matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

Not only filing of the written statement in a suit, but filing of any statement, application, affidavit by a defendant prior to the filing of the written statement will be construed as "submission of a statement on the substance of the dispute", if by filing such statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waives his right to seek reference to arbitration. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him.

In this case, the counter-affidavit dated 15.12.1999, filed by the appellant in reply to the notice of motion (seeking appointment of a Receiver and grant of a temporary injunction) clearly stated that the reply-affidavit was being filed for the limited purpose of opposing the interim relief. Even in the absence of such a disclaimer, filing a detailed objection to an application for interim relief cannot be considered to be submission of a statement on the substance of the dispute resulting in submitting oneself to the jurisdiction of the court.

The term "arbitrability" has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under :

> *(i) Whether the disputes are capable of adjudication and settlement by arbitration?* That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal.

The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific

individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide *Black's Law Dictionary.*)

Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force".

The distinction between disputes which are capable of being decided by arbitration, and those which are not, is brought out in three decisions of this Court in *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., (1999) 5 SCC 688, Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651* and *Chiranjilal Shrilal Goenka v. Jasjit Singh, (1993) 2 SCC 507.*

An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but creates only a personal obligation. Therefore, if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right in rem. A mortgage suit for sale of the mortgaged property is an action in rem, for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided by the courts of law and not by Arbitral Tribunals.

The scheme relating to adjudication of mortgage suits contained in Order 34 of the Code of Civil Procedure, replaces some of the repealed provisions of the Transfer of Property Act, 1882 relating to suits on mortgages (Sections 85 to 90, 97 and 99) and also provides for implementation of some of the other provisions of that Act (Sections 92 to 94 and 96). Order 34 of the Code does not relate to execution of decrees, but provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security.

The provisions of the Transfer of Property Act read with Order 34 of the Code, relating to the procedure prescribed for adjudication of the mortgage suits, the rights of mortgagees and mortgagors, the parties to a mortgage suit, and the powers of a court adjudicating a mortgage suit, make it clear that such suits are intended to be decided by public fora (courts) and therefore, impliedly barred from being referred to or decided by private fora (Arbitral Tribunals).

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193. ARBITRATION AND CONCILIATION ACT, 1996 – Section 11 (6) MADHYA PRADESH MADHYASTHAM ADHIKARAN ADHINIYAM, 1983 – Section 1

(i) Appointment of arbitrator – Which Act would apply? Where contract in question contains Arbitration Clause, Act of 1996 would apply – Where there is no such Arbitration Clause in contract, Act of 1983 would apply.

(ii) Arbitrator has been appointed by the Chief Justice – Arbitral Tribunal could not go behind such decision and rule on its own jurisdiction or on existence of arbitral clause.

M/s. APS Kushwaha (SSI Unit) v. Municipal Corporation, Gwalior & Ors.

Judgment dated 17.02.2011, passed by the Supreme Court in Civil Appeal No. 1888 of 2011, reported in AIR 2011 SC 1935

Held:

This Court in *V.A. Tech Escher Wyass Flovel Ltd. v. M.P.S.E. Board, 2010 (2) MPHT 13 (SC)* held that the provisions of the Act would apply where there was an Arbitration clause and the provisions of the 1983 Adhiniyam would apply where there was no Arbitration Clause. In this case it is not in dispute that the contract between the parties contained an arbitration clause (clause 29). The decision of the High Court that the provisions of the 1983 Adhiniyam would apply and sole arbitrator appointed by the designate of the Chief Justice lacked inherent jurisdiction, cannot therefore be sustained. Though the said Arbitration Clause provided for reference of disputes to a three member Arbitration Board, the designate chose to appoint a sole arbitrator and that order dated 11.05.2007 attained finality.

In *SBP & Co. v. Patel Engineering Ltd., AIR 2006 SC 450,* a Constitution Bench of this Court held that once the Chief Justice or his designate appoints an Arbitrator in an application under Section 11 of the Act, after satisfying himself that the conditions for exercise of power to appoint an arbitrator are present, the Arbitral Tribunal could not go behind such decision and rule on its own jurisdiction or on the existence of an arbitration clause. Therefore, the contention of the respondents that the arbitrator ought to have considered the objection relating to jurisdiction and held that he did not have jurisdiction, cannot be accepted.

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194. ARBITRATION AND CONCILIATION ACT, 1996 – Section 11 (6) Petition for appointment of Arbitrator – Construction agreement is executed between owner of land, developer and purchaser – There is a separate agreement between purchaser and his bank – Purchaser invokes arbitration clause of construction agreement – As bank is not a party to construction agreement, so bank cannot be impleaded as a respondent in this petition.

Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar & Anr. Judgment dated 29.03.2011, passed by the Supreme Court in Civil Appeal No. 2691 of 2011, reported in AIR 2011 SC 1899

Held:

In *Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719* this Court held:

> "The existence of an arbitration agreement as defined under Section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator/Arbitral Tribunal, under Section 11 of the Act by the Chief Justice or his designate. It is not permissible to appoint an arbitrator to adjudicate the disputes between the parties in the absence of an arbitration agreement or mutual consent."

In *Yogi Agrawal v. Inspiration Clothes & U, AIR 2009 SC 1098),* this court observed :

> "When Sections 7 and 8 of the Act refer to the existence of an arbitration agreement between the parties, they necessarily refer to an arbitration agreement in regard to the current dispute between the parties or the subject-matter of the suit. It is fundamental that a provision for arbitration, to constitute an arbitration agreement for the purposes of Sections 7 and 8 of the Act, should satisfy two conditions. Firstly, it should be between the parties to the dispute. Secondly, it should relate to or be applicable to the dispute."

In *S. N. Prasad v. Monnet Finance Ltd., AIR 2011 SC 442,* this Court held:

> "There can be reference to arbitration only if there is an arbitration agreement between the parties. If there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitration can be only with respect to the parties to the arbitration agreement and not the non-parties ..... As there was no arbitration agreement

between the parties, the impleading of the appellant as a respondent in the proceedings and the award against the appellant in such arbitration cannot be sustained."

Therefore, if 'X' enters into two contracts, one with 'M' and another with 'D', each containing an arbitration clause providing for settlement of disputes arising under the respective contract, in a claim for arbitration by 'X' against 'M' in regard to the contract with 'M', 'X' cannot implead 'D' as a party on the ground that there is an arbitration clause in the agreement between 'X' and 'D'.

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***195. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 28 and 34**

(i) *Scope of interference in arbitral award.*

A civil court examining the validity of an arbitral award under Section 34 of the Act exercises supervisory and not appellate jurisdiction over the awards of an Arbitral Tribunal – A court can set aside an arbitral award, only if any of the grounds mentioned in Sections 34 (2) (a) (i) to (v) or Sections 34 (2) (b) (i) and (ii), or Section 28 (1) (a) or 28 (3) read with Section 34 (2) (b) (ii) of the Act, are made out – An award adjudicating claims which are "excepted matter" excluded from the scope of arbitration, would violate Sections 34 (2) (a) (iv) and 34 (2) (b) of the Act – Making an award allowing or granting a claim, contrary to any provision of the contract, would violate Section 34 (2) (b) (ii) read with Section 28 (3) of the Act.

(ii) Section 34 (2) (a) (iv) of the Act – Segregation from arbitral award – It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent.

(iii) *Interpretation of Section 28.*

Interpreting the provisions of Section, the Apex Court in *ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705* **held that a court can set aside an award under Section 34 (2)((b) (ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. To hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality – An award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.**

(iv) *Award made in violation of the terms of the contract*
It is well settled that where the contract and unambiguous terms, bars or prohibits a particular claim, any award made in violation of the terms of the contract would violate Section 28 (3) of the Act, and would be considered to be patently illegal and therefore, liable to be set aside under Section 34 (2) (b) of the Act.

J.G. Engineers Private Limited v. Union of India and another
Judgment dated 28.04.2011 passed by the Supreme Court in Civil Appeal No. 3349 of 2005, reported in (2011) 5 SCC 758

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*196. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 31 (5) and 34 (3)
LIMITATION ACT, 1963 – Section 12
GENERAL CLAUSES ACT, 1897 – Sections 3 (35) and 9

(i) The delivery of an arbitral award under Section 31 (5) is not a matter of mere formality – Copy of the award is to be received by the party – If one of the parties in arbitration is a Government or a statutory body or a corporation, which has notified holidays or non-working days and the award is delivered or deposited or left in the office of a party on a non-working day, the date of such physical delivery is not the date of "receipt" of the award by that party – The fact that the beldar or a watchman was present on a holiday or non-working day and had received the copy of the award cannot be considered as "receipt of the award" by the party concerned, for the purposes of Section 31 (5) of the Act – Necessarily, the date of receipt will have to be the next working day.

(ii) Section 12 of the Limitation Act, 1963 provides for exclusion of time in legal proceedings – Sub-section (1) thereof provides that in computing the period of limitation for any application, the day from which such period is to be reckoned, shall be excluded – Section 9 of the General Clauses Act, 1897 provides that in any Central Act, when the word "from" is used to refer to commencement or time, the first of the days in the period of time shall be excluded – Both these provisions are applicable to Section 34 (3) of the Arbitration and Conciliation Act, 1996.

(iii) Section 3 (35) of the General Clauses Act, 1897 defines a "month" as meaning a month reckoned according to the English calendar – Therefore, when the period prescribed is three months (as contrasted from 90 days) from a specified date, the said period would expire in the third month on the date of corresponding to the date upon which the period starts – As a result, depending upon the months, it may mean 90 days or 91 days or 92 days or 89 days.

In this case the award was received by the Executive Engineer on 12.11.2007, for the purpose of calculating the three months period, the said date shall have to be excluded having regard to Section 12 (1) of the Limitation Act, 1963 and Section 9 of the General Clauses Act, 1897. Consequently, the three months should be calculated from 13.11.2007 and would expire on 12.02.2008. Thirty days from 12.02.2008 under the proviso should be calculated from 13.02.2008 and, having regard to the number of days in February, would expire on 13.03.2008.

State of Himachal Pradesh and another v. Himachal Techno Engineers and another

Judgment dated 26.07.2010 passed by the Supreme Court in Civil Appeal No. 5998 of 2010, reported in (2010) 12 SCC 210

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197. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 31 (5) and 34 (3)

Whether the period of limitation for making an application under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside an arbitral award is to be reckoned from the date a copy of the award is received by the objector by any means and from any source, or it would start running from the date a signed copy of the award is delivered to him by the arbitrator?

Apex Court held that if the law prescribes that a copy of the order/ award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a particular way and in case the law also sets a period of limitation for challenging the order/ award in question by the aggrieved party, then the period of limitation can only commence from the date on which the order/award was received by the party concerned in the manner prescribed by law.

State of Maharashtra and others v. Ark Builders Private Limited

Judgment dated 28.02.2011 passed by the Supreme Court in Civil Appeal No. 2152 of 2011, reported in (2011) 4 SCC 616

Held :

Factual position in this case:

On 20.03.2003 the arbitrator gave a copy of the award, signed by him, to the claimant (the respondent) in whose favour the award was made. No copy of the award was, however, given to the appellant, the other party to the proceedings, apparently because the appellant had failed to pay the costs of arbitration. The respondent submitted a copy of the award in the office of the Executive Engineer (Appellant 4) on 29.03.2003 claiming payment in terms of the award.

The Executive Engineer by his letter dated 15.01.2004, acknowledged all the three letters of the claimant and informed him that the Government had decided to challenge the award before the appropriate forum.

According to the appellants, the decision to make an application for setting aside the award was taken on 16.12.2003, but no application could be made for want of a copy of the award from the arbitrator. Hence, on 17.01.2004, a messenger was sent to the arbitrator with a letter asking for a copy of the award. The arbitrator made an endorsement on the letter sent to him stating that on the request of the claimant the original award was given to him and the Xerox copy of the award (sent to him along with the letter) was being certified by him as true copy of the award. The endorsement from the arbitrator along with the Xerox/certified copy of the award was received from the arbitrator on 19.01.2004 and on 28.01.2004, the appellants filed the application under Section 34 of the Act.

Legal position as discussed and observed by the Apex Court:

The two provisions of the Arbitration and Conciliation Act, 1996, relevant to answer the question raised in the case are Sections 31 and 34. Section 31 deals with form and contents of arbitral award; and insofar as relevant for the present provides as follows:

> *"31. Form and contents of arbitral award.*— (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.
>
> (2)-(4) * * *
>
> (5) After the arbitral award is made, a signed copy shall be delivered to each party.
>
> (6)-(8) * * *"

Section 31 (1) obliges the members of the Arbitral Tribunal/arbitrator to make the award in writing *and to sign it* and sub-section (5) then mandates that a *signed* copy of the award would be delivered to each party. A signed copy of the award would normally be delivered to the party by the arbitrator himself. The High Court clearly overlooked that what was required by law was the delivery of a copy of the award *signed* by the members of the Arbitral Tribunal/arbitrator and not any copy of the award.

Section 34 of the Act then provides for filing an application for setting aside an arbitral award, and sub-section (3) of that section lays down the period of limitation for making the application in the following terms:

> *34. Application for setting aside arbitral award.*— (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) * * *

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the Arbitral Tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) ★ ★ ★

The expression "party making that application had *received* the arbitral award" (emphasis supplied) cannot be read in isolation and it must be understood in light of what is said earlier in Section 31 (5) that requires a signed copy of the award to be delivered to each party. Reading the two provisions together it is quite clear that the limitation prescribed under Section 34 (3) would commence only from the date a signed copy of the award is delivered to the party making the application for setting it aside.

We are supported in our view by the decision of this Court in *Union of India v. Tecco Trichy Engineers & Contractors, (2005) 4 SCC 239,* in SCC para 8 of the decision it was held and observed as follows:

> "8. The delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be 'received' by the party. This delivery *by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as an* application for correction and interpretation of an award within 30 days under Section 33 (1), an application for making an additional award under Section 33 (4) and *an application for setting aside an award under Section 34 (3) and so on. As this delivery of the copy of the award* has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation *which would be calculated from that date,* the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings."

The highlighted portion of the Judgment extracted above leaves no room for doubt that the period of limitation prescribed under Section 34 (3) of the Act would start running only from the date a signed copy of the award is delivered to/received by the party making the application for setting it aside under Section 34 (1) of the Act. The legal position on the issue may be stated thus. If the law prescribes that a copy of the order/award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a particular way and in case the law also sets a period of limitation for challenging the order/award in question by the aggrieved party, then the period of limitation can only commence from the date on which the order/award was received by the party concerned in the manner prescribed by the law.

In *Sheo Shankar Sahay (Dr.) v. Commr., 1965 BLJR 78,* the Patna High Court while considering the provisions of Section 18 (1) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 observed that Section 18 (1) provides limitation of fifteen days 'from the date of receipt of the order' and not from the date of communication of the order. It is significant that Section 14 of the Bihar House Rent Control Order, 1942, had provided that 'any person aggrieved by an order of the Controller may, within fifteen days from the date on which the order is communicated to him, present an appeal in writing to the Commissioner of the division'. Section 18 (1) of Bihar Act 3 of 1949 is couched in different language. *In our opinion, Section 18 (1) implies that the Controller is bound, as a matter of law, to send a written copy of his order to the person aggrieved, and limitation for filing an appeal does not start unless and until the copy of the order is sent.* (emphasis supplied)

The Apex Court in this case agreed with the view taken by the Patna High Court in *Sheo Shankar Sahay (Dr.)* (supra) and held that the application made by the appellant under Section 34 of the Act is within the prescribed limitation. It was also observed that the appellant would appear to be deriving undue advantage due to the omission of the arbitrator to give them a signed copy of the award coupled with the supply of a copy of the award to them by the respondent claimant but that would not change the legal position and it would be wrong to tailor the law according to the facts of a particular case.

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198. CIVIL PROCEDURE CODE, 1908 – Section 34
INTEREST ACT, 1978 – Section 3
Power of Court to allow interest – The interest must be allowed in cases of claim for compensation from the date of institution of proceedings and not from any deferred date.

Smt. Veena Rao Phalke v. Union of India
Judgment dated 25.01.2011 passed by the High Court of M.P. in Misc. Appeal No. 1336 of 2010, reported in 2011 (3) MPHT 68

Held:

The issue as to whether the interest is to be ordered from the date of filing of application or from the date of award is no more *res integra* and has been settled at rest by the judgment rendered by the Supreme Court in *Thazhathe Purayil Sarabi and others v. Union of India and another, AIR 2009 SC 3098,* wherein, it is held by Their Lordships: –

> **16.** It is, therefore, clear that the Court, while making a decree for payment of money is entitled to grant interest at the current rate of interest or contractual rate as it deems reasonable to be paid on the principal sum adjudged to be payable and/or awarded, from the date of claim or from the date of the order or decree for recovery of the outstanding dues. There is also hardly any room for doubt that interest may be claimed on any amount decreed or awarded for the period during which the money was due and yet remained unpaid to the claimants.
>
> **17-18.** The Courts are consistent in their view that normally when a money decree is passe, it is most essential that interest be granted for the period during which the money was due, but could not be utilized by the person in whose favour an order of recovery of money was passed. As has been frequently explained by this Court and various High Courts, interest is essentially a compensation payable on account of denial of the right to utilize the money due, which has been, in fact, utilized by the person withholding the same. Accordingly, payment of interest follows as a matter of course when a money decree is passed. The only question to be decided is since when is such interest payable on such a decree. Though, there are two divergent views, one indicating that interest is payable from the date when claim for the principal sum is made, namely, the date of institution of the proceedings in the recovery of the amount, the other view is that such interest is payable only when a determination is made and order is passed for recovery of the dues. However, the more consistent view has been the former and in rare cases interest has been awarded for periods even prior to the institution of proceedings for recovery of the dues, where the same is provided for by the terms of the agreement entered into between the parties or where the same is permissible by statute.
>
> **19.** Accordingly, we are unable to sustain the order of the Railway Claims Tribunal directing payment of interest on default of the payment of the principal sum within a period

of 45 days. As we have indicated, hereinbefore, when there is no specific provision for grant of interest on any amount due, the Court and even Tribunals have been held to be entitled to award interest in their discretion, under the provisions of Section 3 of the Interest Act and Section 34 of the Civil Procedure Code."

In *Siddha Muni Shukla and others v. Union of India and another, M.A. No. 2868/2006,* decided on 01.11.2006, Division Bench of this Court observed: –

"On the scrutiny of the award, it is clear as a day that the interest has been granted on a condition that if the respondent would pay compensation within 60 days, no interest would be leviable. It is trite law that this would not amount to grant of interest. Mr. Dubey has submitted that the interest may be granted from the date of presentation of the application before the Tribunal, i.e. from 16.09.2002. To buttress his aforesaid submission, he has placed reliance on the decision rendered in the case of *Union of India v. Smt. Laxmipati and another, AIR 1995 MP 90.*

Recently, this Court in the case of *Union of India v. Rami Bai,* in *M.A. No. 1220 of 2006* after referring to various decisions rendered in the cases of *Ambica Quarry Works v. State of Gujarat, AIR 1987 SC 1073, Ramesh Chandra Daga v. Rameshwari Bai, (2005) 4 SCC 772, Zee Telefilms Ltd. and another v. Union of India and others, (2005) 4 SCC 649, P.S. Sathappan (dead) by L.Rs. v. Andhra Bank Ltd. and others, (2004) 11 SCC 672* and *Executive Engineer Dhenkenal Minor Irrigation Division Orissa v. N.C. Bhudarai (dead) by L.Rs. etc., AIR 2001 SC 626,* has expressed the opinion as under: –

"Only to show that in the absence of any prohibition interest can be awarded as an accessory or incidental to the sum awarded as due and payable. On the scrutiny of the Act and the Rules, it is clearly evincible that is no prohibition. The Division Bench of this Court in the case of *Smt. Laxmipati* (supra), has dealt with the provisions of the Act, Rules and conception of grant of interest. The Division Bench had addressed itself with regard to the claims for unliquidated damages. The Division Bench decision is a binding precedent on us and we do not find any reason to differ with the same. In fact, we respectfully concur with the said view. We may state here, Mr. Upadhyaya laboured hard to persuade us that the law laid down

in the case of *Laxmipati* (supra), requires reconsideration in view of the law laid down in the case of *Sanjay Sampatrao Gaikwad* (supra) and *Rathi Menon* (supra). We have already dealt with the decision rendered in the case of *Rathi Menon* (surpa), and expressed the opinion that the Apex Court has not laid down the law that interest can only be granted from the date of order passed by the Railway Claims Tribunal. As far as the law laid down in the case of *Sanjay Sampatrao Gaikwad* (supra), with due respect has not persuaded us to express a different note than that has been stated in the case of *Laxmipati* (supra)."

In view of above exposition of law in respect of grant of interest in a claim for compensation that it must be from the date of institution of the proceeding, the present appeal is allowed and the order dated 18.02.2009 of the Tribunal is modified to the extent that appellants shall be entitled for interest at the rate of 7% from the date of institution of proceedings before the Railway Claims Tribunal till the date of realization.

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***199. CIVIL PROCEDURE CODE, 1908 – Section 151, Order 21 Rules 105 and 106**

Inherent power to restore execution application – Applicant filed application for execution of decree – Applicant sought time to file certified copy of judgment and decree – Execution proceedings dismissed for want of prosecution – Held, when execution proceedings were dismissed for default, it was not a date of hearing within the meaning of Order 21 Rule 105 as proceedings were fixed only for filing of certified copy – Dismissal of execution proceedings was in exercise of inherent power – Application for restoration has to be entertained by invoking inherent powers of Court – No time limit is prescribed – Revision allowed.

Gayaram Tamrakar v. Chandrabhan Singh

Judgment dated 24.02.2011 passed by the High Court of M.P. in C.R. No. 198 of 2009, reported in ILR (2011) MP 1551

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200. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10
HINDU MARRIAGE ACT, 1955 – Section 13 (1) (i)

Addition of parties – The question as to addition of parties is of judicial discretion and depends upon facts and circumstances of a particular case – If by adding a person as party, Court is in a better position to effectively and completely adjudicate the controversy involved in the suit, then person concerned should be impleaded as a party in the proceeding.

Necessary party and proper party, distinction between – A necessary party is one without whom no order can be made effectively – A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings.

Whether a person with whom adultery was committed by the respondent spouse is a proper party to the petition for dissolution of marriage on the ground of adultery? Held, Yes.

Jaideep Shah v. Rashmi Shah @ Miss Rashmi Vyas

Judgment dated 18.04.2011 passed by the High Court of M.P. in W.P. No. 18318 of 2010, reported in 2011 (2) MPLJ 680

Held:

The question of addition of a party under Order 1, Rule 10 of the Code of Civil Procedure is generally of judicial discretion which has to be exercised in the facts and circumstances of a particular case. Where the Court is of the opinion that by adding a party it would be in a better position to effectively and completely adjudicate the controversy involved in the suit, in such a case the concerned person should be impleaded as a party in the proceeding. See : *Razia Begum v. Sahebzadi Anwar Begum and others, AIR 1958 SC 886, Balraj Taneja and another v. Sunil Madan and another, AIR 1999 SC 3381* and *Ruma Chakraborty v. Sudha Rani Banerjee and another, AIR 2005 SC 3557.* The distinction between necessary and proper party is also well settled in law. A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. See : *Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and others, (1992) 2 SCC 524.*

In a petition under Section 13 (1) (i) of the Hindu Marriage Act, 1955, an allegation of voluntary sexual intercourse by the spouse with a third party is required to be adjudicated. The High Court in exercise of power under sections 14 and 21 of the Hindu Marriage Act 1955 has framed Rules. Under Rule 2(7) (e)(2) of the Rules, in a petition seeking dissolution of marriage on the ground of adultery, the date and place of the adultery and the name and address of the person with whom the adultery was committed by the respondent is required to be stated. Rule 5 enjoins a duty on the Court to issue notice to the respondent and co-respondent, if any. The aforesaid Rule is in consonance with the principles of natural justice as the finding recorded in the suit would adversely affect the reputation of the concerned person and, therefore, such a person should have an opportunity to defend his reputation before such a finding is recorded. My aforesaid conclusion finds support from a Division Bench decision of Karnataka High Court reported in *Arun Kumar Agrawal v. Radha Arun and others, AIR 2003 Karnataka 508.* So far as the reliance placed by the learned counsel for the respondent No. 2 on the decision of this Court in *Neelam Tiwari v. Sunil Tiwari,*

2009 (3) MPLJ 45, is concerned, in the said case, the adulterer was not impleaded as a party in the petition for divorce before the trial Court. In appeal, an objection was raised that since the adulterer was not impleaded as co-respondent, therefore, the petition filed under section 13 of the Hindu Marriage Act, 1955 was bad on account of non-joinder of necessary party. In the aforesaid context, the learned Single Judge of this Court held that Rules framed by this Court does not mandatorily require the impleadment of the adulterer. The ratio laid down in the aforesaid case is of no assistance to learned counsel for the respondent No. 2, in the facts and circumstances of the case.

For the aforementioned reasons, the order passed by the trial Court dated 07.12.2010 cannot be sustained in the eye of law.

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201. CIVIL PROCEDURE CODE, 1908 – Order 3 Rule 1
EVIDENCE ACT, 1872 – Section 114 (g)
Power of attorney holder – The plaintiff authorised his power of attorney holder to conduct the suit and to do all other actions which are necessary – Held, such power of attorney holder can appear as a witness as well if he has information of the fact of the case.
Nature of presumption under Section 114 (g) of Evidence Act – Such presumption is discretionary – The Court may or may not raise such a presumption.
Presumption – A presumption must be drawn against a party who having knowledge of the fact in dispute does not go into the witness box, particularly when a *prima facie* case is made out against him – The question of drawing an adverse inference on account of non-examination of a party has to be decided in the facts of each case.

Jagdish Prasad & ors. v. Smt. Meera Devi & ors.
Judgment dated 18.01.2011 passed by the High Court of M.P. in S.A. No. 507 of 2001, reported in ILR (2011) M.P. 1259

Held:

The plaintiff had authorized her son to conduct the suit and to do all other acts which are necessary. Thus, it cannot be said that the power of attorney does not authorize the plaintiff's son to depose on her behalf. Planitiff's witness No.1 Pradeep Kumar Gupta, the son of the plaintiff, has stated in paragraph 2 of his deposition that he has the information about the case. In cross-examination, the statement of plaintiff's Witness No.1 that he has the information about the case has not been rebutted. An attorney can appear as a witness as well. The burden to prove the plea vide Exhibit D-1 dated 15.1.1985 that plaintiff had relinquished her right, title or interest in favour of the defendant No.1, was on the defendants which they failed to discharge. Under Section 114 of the Evidence Act, presumption which may be raised, is discretionary. The Court may or may not raise such a presumption. A presumption must be drawn

against a party who having knowledge of the fact in dispute does not go into the witness box, particularly, when a *prima facie* case is made out against him. The question of drawing an adverse inference on account of non-examination of a party has to be decided in the facts of each case. The decision relied upon, on behalf of the appellants in *Bandhu Mahto (Dead) by LRs. and another v. Bhukhii Mahatain and others, (2007) 10 SCC 564,* does not apply as it was a case where witness though present in the court, was not examined. Similarly, decision of Supreme Court in *Vidhyadhar v. Mankikrao and another, AIR 1999 SC 1441* is of no assistance, as the defendant in that case did not appear to prove the plea taken by him, which is not the case here. In the instant case no adverse inference can be drawn on account of non-production of the plaintiff.

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202. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 2
TRANSFER OF PROPERTY ACT, 1882 – Section 58
ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12(1)(a)
Pleading – 'Material facts' and 'Material particulars' – Meaning and distinction between explained.
Mortgage, what amounts to – A sale deed, rent note and agreement to resell are executed on the same day between the parties – Though the transaction cannot be treated as mortgage as defined in Section 58 (c) of Transfer of Property Act, yet the transaction is mortgage in substance and essence.
Whether question of title can be decided in a suit for ejectment and arrears of rent? Held, Yes – The question of title can be gone into for the purpose of deciding the relationship of landlord and tenant.

Rameshchandra and another v. Kamal Kishore and others
Judgment dated 23.09.2010 passed by the High Court of M.P. in Second Appeal No. 304 of 1999, reported in 2011 (3) MPHT 124

Held:

There is a marked distinction between the material facts and material particulars as observed by the Hon'ble Supreme Court of India as well as by this Court in following paragraphs :-

(A) Hon'ble Supreme Court of India in the case of *Udhav Singh v. Madhav Rao Scindia, AIR 1976 SC 744,* has held:-

> "37. Like the Code of Civil Procedure, this section also envisages a distinction between "material facts" and material particulars" clause (a) of sub-section (1) corresponds to Order 6, Rule 2, while clause (b) is analogous to Order 6 Rules 4 and 6 of the Code. The distinction between "material facts" and "material particulars" is important because different consequences may flow from a deficiency of such facts or particulars in the pleading. Failure to plead even a

single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order 6 Rule 16, Code of Civil Procedure. If the petition is based solely on those allegations which suffer from lack of material facts, the petition is liable to be summarily rejected for want of a cause of action. In the case of a petition suffering from a deficiency of material particulars, the Court has a discretion to allow the petitioner to supply the required particulars even after the expiry of limitation.

38. All the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence, are "material facts". In the context of a charge of "corrupt practice", "material facts" would mean all the basic facts constituting the ingredients of the particular corrupt practice alleged, which the petitioner is bound to substantiate before he can succeed on that charge. Whether in an election petition, a particular fact is material or not and as such required to be pleaded is a question which depends on the nature of the charge leveled, the ground relied upon and the special circumstances of the case. In short, all those facts which are essential to clothe the petitioner with a complete cause of action, are "material facts" which must be pleaded, and failure to plead even a single material fact amounts to disobedience of the mandate of Section 83(1)(a).

39. "Particulars", on the other hand, are "the details of the case set up by the party". "Material particulars" within the contemplation of clause (b) of Section 83 (1) would, therefore, mean all the details which are necessary to amplify, refine and embellish the material facts already pleaded in the petition in compliance with the requirements of clause (a). 'Particulars' serve the purpose of finishing touches to the basic contours of a picture already drawn, to make it full, more detailed and more informative.

(B) Aforesaid law has been followed in various cases. In *Harkirat Singh v. Amarinder Singh, AIR 2006 SC 713,* Hon'ble Apex Court has observed:-

"50. A distinction between 'material facts' and 'particulars', however, must not be overlooked. 'Material facts' are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. 'Particulars',

on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. 'Particulars' thus, ensure conduct of fair trial and would not take the opposite party by surprise.

51. All 'material facts' must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial."

(C) This Court has in the case of *Manorama Devi Wd/o Parmanad and others v. Suresh s/o Kailash Narain and others, 1999 (1) MPLJ 436,* observed: -

"21. A distinction must be made between omission to state material facts and omission to give full particulars. If material facts are omitted, a party should not be allowed to raise a contention on a particular point even if, some materials are available in the evidence. If on the other hand material facts have been pleaded but full particulars have not been given the Court may permit the points to be raised on the basis of the evidence unless the opposite party is thereby materially prejudiced. The first obviously relate to a question of jurisdiction and the second to one of procedure."

An agreement of re-sale executed in favour of plaintiffs is a material fact which is found to have been pleaded in the plaint. The fact that the same was taken back by the defendant at the time of execution of a fresh agreement dated 11-09-72 may be material particular.

In case of *Shyam Singh v. Daryao Singh (Dead) By L.Rs. and others, AIR 2004 SC 348,* it has been observed: -

"12....As the sale and agreement of repurchase are contained in two separate documents although contemporaneously executed, the transaction cannot treated to be a 'mortgage' as defined in Section 58(c) read with proviso thereunder of the Transfer of Property Act but it seems to be a transaction akin to a 'mortgage' – if not mortgage proper. From the tenor and contents of the two documents contemporaneously executed, it seems that the

> defendant Nos. 2 to 4 to raise money, sold the property but with a right of repurchase on return of the money. A long period of ten years for obtaining reconveyance was agreed between the original contracting parties to indicate the nature of transaction to be one to satisfy the monetary need of the transferor. Initial period of five years was stipulated for obtaining reconveyance mutually, failing which after expiry of the period of five years, reconveyance could be obtained through Court within an outer limit of ten years from the original date of the execution of the document. It seems unjust to construe the terms of the document to mean that though the original transferors of the property are unable to raise requisite money within the initial period of five years and thereafter continue to be incapable financially to approach Court for seeking reconveyance, they would have no right to assign or transfer their right on value to others. This would result in deprivation of the property or competitive value altogether to the original owners."

In the case of *K. Simrathmull v. Nanjalingiah Gowder, AIR 1963 SC 1182,* following earlier majority view of the Federal Court in the case of *Shanmughal Pillai v. Annalakshmi Ammal, AIR 1950 FC 38,* has been affirmed :-

> "where under an agreement an option to a vender is reserved for repurchasing the property sold by him the option is in the nature of a concession or privilege and may be exercised on strict fulfillment of the conditions on the fulfillment of which it is made exercisable."

Evidence of contemporaneous agreement is always admissible as a surrounding circumstance as has been held in the case *Bhaskar Waman Joshi (deceased) and others v. Shrinarayan Rambilas Agarwal (deceased) and others, AIR 1960 SC 301.* In the case of *Chunchun Jha v. Ebadat Ali and another, AIR 1954 SC 345,* the document in question was held to be a mortgage by conditional sale after taking into consideration the language of the document and the evidence on record. In Paragraph 6, it has been observed :-

> "6. ....If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended."

The Hon'ble Apex Court in the case of *Shyam Singh* (supra), has observed that such a transaction is akin to 'mortgage' – if not 'mortgage proper'. It has clearly been held by the Hon'ble Supreme Court of India in the case of *Gulab Chand (dead) by L.Rs. v. Babulal (dead) by L.Rs. and others, 1998 (1) JLJ 1* (SC), that if a sale deed, rent note and agreement to resell are executed on the same day between the parties they would reveal that the transactions were essentially a mortgage in substance and essence.

The question of title can be gone into for the purpose of deciding the relationship of landlord and tenant. This Court in the case of *Babulal v. Deo Janki, 1985 MPWN-SN 46,* in the eviction suit, has observed :-

> "It maybe mentioned that this is not a title suit in which adjudication of the title set up by the defendant has to be made. It is settled that the question of title can be gone into only incidentally in such a suit, for the purpose of deciding the relationship of landlord and tenant."

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203. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11 (a)
TRANSFER OF PROPERTY ACT, 1882 – Sections 106 and 111
Eviction suit – Plea as to non-maintainability of suit on the ground that the suit was filed prior to expiry of fixed term of lease i.e. prematurity of suit – Held, such plea should be promptly raised before the court and it will be the responsibility of the court to examine and dispose it promptly – Such plea may not be permitted to be raised at the belated stage of suit.

Amritlal v. Mutavalli Hussain Tekri
Judgment dated 02.07.2010 passed by the High Court of M.P. in S.A. No. 185 of 2008, reported in 2011 (2) MPLJ 543

Held:

In the matter of *Vithalbai (P) Ltd. v. Union Bank of India, (2005) 4 SCC 315* Hon'ble the Apex Court has observed that a plea as to non-maintainability of the suit on the ground of its being premature should be promptly raised by the defendant and pressed for decision. It will equally be the responsibility of the Court to examine and promptly dispose of such a plea. The Court may reject the plaint if it does not disclose a cause of action. It may dismiss the suit with liberty to the plaintiff to file a fresh suit on its maturity. The plaintiff may himself withdraw the suit at that stage and such withdrawal would not come in the way of the plaintiff in filing the suit on its maturity. In either case, the plaintiff would not be prejudiced. The plea may not be permitted to be raised at a belated stage of the suit. If the defendant by his inaction amounting to acquiescence or waiver allows the suit to proceed ahead, then he cannot be permitted belatedly to urge such a plea as that would cause hardship, may be irreparable prejudice, to the plaintiff because of lapse of time. The Court would examine if any prejudice

has been caused to the defendant or any manifest injustice would result to the defendant if the suit is to be decreed. The Court would also examine to the need of filing a fresh suit or grant a decree in the same suit inasmuch as it would not make any real difference at the stage if the suit would have to be filed again on its having matured for filing.

Keeping in view the aforesaid position of law and also the fact that the appellant himself violated the terms and conditions of the rent-agreement, this Court is of the opinion that suit filed by the respondent is not pre-mature in spite of the fact that the terms of tenancy was not expired. Apart from this, since tenancy was for 11 months and also more than 8 years has lapsed, therefore, neither appellant can be allowed to raise the plea that the suit filed by the respondent was pre-mature, nor any prejudice has caused to the appellant. On the contrary if at this stage suit is dismissed holding that suit is pre-mature, then it will cause not only hardship but also irreparable loss to the respondent. In view of this, no illegality has been committed by learned Courts below in passing the decree of eviction against the appellant. Even otherwise also the findings recorded by learned Courts below are the concurrent findings of fact which requires no interference. Since no substantial question of law is involved in the appeal, hence, the appeal filed by the appellant has no force and is hereby dismissed.

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204. CIVIL PROCEDURE CODE, 1908 – Order 11 Rule 12

CIVIL PRACTICE :

Discovery of documents – Any party to a suit may without filing an affidavit can apply to the Court for an order directing any other party to a suit to make discovery on oath of document which are or have been in possession or power relating to any matter in question therein.

Discovery of documents – Plaintiff filed suit for eviction under Section 12 (1)(a) and (f) of M.P. Accommodation Control Act, 1961 – Defendant filed application for discovery of lease agreements executed by plaintiff in respect of other shops – Held, onus is on plaintiff to prove bonafide requirement – Defendant failed to establish that an irretrievable defence which may crop up in his favour if documents are not produced, is prejudiced – Since primary onus lies on plaintiff, therefore, trial Court rightly rejected the application.

No party or counsel is entitled to make a grievance that the judgments, which are being cited, are not relied upon or mentioned unless the ratio laid down therein has any relevance in the given case.

Kishore Kumar & anr. v. Mohd. Hussain & ors.

Judgment dated 08.02.2011 passed by the High Court of M.P. in W.P. No. 2196 of 2011, reported in ILR (2011) MP 1487 (DB)

Held:

Order 11 Rule 12 CPC stipulates that "any party may without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs."

Thus, any party to a suit may without filing an affidavit can apply to the Court for an order directing any other party to any suit to make discovery on oath of document which are or have been in possession or power relating to any matter in question therein.

Question is whether the discovery as has been sought for by the petitioner defendant is of documents having relevancy. In the context, true it may be that, the petitioners defendants have a right to dislodge the case of the petitioner regarding bona fide need; however, a discovery as is being sought for would be necessary in the matter in question.

Admittedly, the plaintiff has lodged the civil suit for eviction on two grounds; one being arrears of rent and other for bona fide need. The onus is, therefore, on the plaintiff to prove the bona fide requirement. The defendant has failed to establish that an irretrievable defence which may crop up in his favour if the documents sought for vide application under Order 11 Rule 12 is not produced is prejudiced. Since primary onus lies on the plaintiff to prove the bona fide need for an eviction, in our considered opinion the trial court was well within its jurisdiction as is conferred under Order 11 Rule 12 to have rejected the application.

Next submission by the learned counsel for the petitioner, though with an undertone but have an element of complaint that the judgments which are being cited are not addressed at by the Court, we attach no significance to this submission as it is not unusual for the parties, and counsel to cite innumerable judgments without confining to the ratio attracted and applicable in the matter where it is being cited. No party or counsel is, therefore, entitled to make a grievance that the judgments which are being cited are not relied upon or adverted; as unless the judgments which are being cited has any relevance and if the ratio laid down therein is attracted in the case.

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205. CIVIL PROCEDURE CODE, 1908 – Order 12 Rule 6

The object of Rule 6 of order 12 is to enable the party to obtain a speedy judgment at least to the extent of the relief to which, according to the admission of the defendant, the plaintiff is entitled. Decree on admission, requirement of – The admission must be unequivocal and unambiguous.

Yogesh Kumar Gulati v. Satya Prakash Dhingra

Judgment dated 26.04.2011 passed by the High Court of M.P. in W.P. No. 16543 of 2010 reported in 2011 (2) MPLJ 683

Held:

In the statement of objects and reasons mentioned in amending Act No. 104 of 1976 while amending the provisions of Order 12 Rule 6 of the Code, it has been stated that where a claim is admitted, the Court has discretion to enter a judgment for a plaintiff and to pass a decree on the admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant the plaintiff is entitled. See : *Charanjit Lal Mehra* and *others v. Kamal Saroj Mahajan (Smt.), (2005) 11 SCC 279, Uttam Singh Dugal and Co. Ltd v. Union Bank of India and others, AIR 2000 SC 2740 and Karam Kapahi and others v. Lal Chand Public Charitable Trust, (2010) 4 SCC 753.* It is equally well settled in law that an admission must be clear, unambiguous and unconditional. A judgment on admission by the defendant under Order 12 Rule 6 of the Code is not a matter of right, but is a matter of discretion of the Court. However, the said discretion has to be exercised judicially.

In order to seek a decree on admission under Order 12 Rule 6 of the Code of Civil Procedure, admission has to be unequivocal and unambiguous. There is no unambiguous and unequivocal admission on the part of the defendants with regard to claim of the plaintiff. The trial Court has assigned the cogent reasons for rejection of the application under Order 12 Rule 6 of the Code of Civil Procedure. No case for interference is made out with the order passed by the trial Court.

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***206. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 97 and Order 7 Rule 11**

Respondents filed application under Order 21 Rule 97 in execution proceedings – Application under Order 7 Rule 11 is not maintainable as application under Order 21 Rule 97 is not a plaint though may be decided like a suit.

Kanta (Smt.) & anr. v. Arvind Tare & 3 ors.

Judgment dated 06.04.2011 passed by the High Court of M.P. in C.R. No. 65 of 2011, reported in ILR (2011) MP SN 70

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***207. CIVIL PROCEDURE CODE, 1908 – Order 26 Rule 9**

Commission to make spot inspection – Both parties are claiming ownership right on the suit property i.e. piece of land on behalf of their registered sale deeds – A clear question as to demarcation of property in question and its identity was involved – Held, it was the duty of the court to issue commission by appointing an employee of Revenue Department not below the rank of Revenue Inspector to get the land in dispute demarcated for its identification – No application is required for that purpose. [*Shreepat v. Rajendra Prasad and others, (2000) 6 Supreme 389, Haryana Wakf Board v. Shanti Sharup and others, (2008) 8 SCC 671* **and** *Durga Prasad v. Praveen Foujdar, 1975 MPLJ 801,* **relied on]**

Jaswant v. Deen Dayal

Judgment dated 31.03.2011 passed by the High Court of M.P. in S.A. No. 97 of 2011, reported in 2011 (2) MPLJ 576

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***208. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2**

Temporary injunction, grant of – Applicant filed an application under Order 39 Rules 1 and 2 CPC against non-applicant for not dispossessing him from suit property – There is an order of Chief Executive Officer against him on the ground of being trespasser directing to dispossess him – Admittedly, he is in possession of suit property – He has pleaded that relationship of tenant and landlord still exists between them and rent receipts are filed in this behalf – Held, questions as to whether the status of applicant is that of trespasser or he is still tenant, whether the order of C.E.O. is legal or not, whether the tenancy rights of applicant have come to an end or not etc. are serious questions of fact and law which require to be adjudicated after recording the evidence as they constitute a *prima facie* **case in favour of applicant – If applicant is dispossessed, he will suffer irreparable loss and moreover, balance of convenience is also in his favour – Hence, all three limbs are found in favour of applicant and he is entitled for temporary injunction against non-applicant.**

Maulana Haroon v. M.P. State Wakf Board, Bhopal and others

Judgment dated 20.04.2011 passed by the High Court of M.P. in Civil Revision No. 159 of 2011, reported in 2011 (2) MPLJ 622

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***209. CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1966 (M.P.) – Rule 14 (23)**

Report of departmental enquiry – Necessity to record reasons for his findings **– The Enquiry Officer found charges proved merely by reproducing the evidence of parties and material on record – No reason given by him for accepting evidence of department or for**

rejecting the defence of petitioner – Held, the Enquiry Officer is duty bound to record reasons for his findings with regard to charges – The order shows non-application of mind therefore, on the basis of such report, no action can be taken.

Swami Prasad Yadav v. State of M.P. and others

Judgment dated 15.02.2011 passed by the High Court of M.P. in W.P. No. 13407 of 2003, reported in 2011 (2) MPLJ 317

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210. CONSTITUTION OF INDIA – Articles 21-A and 32
RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009 – Section 3

(i) Children working in circus – In order to implement the fundamental right of the children under Article 21-A, the Supreme Court has issued directions to the Central Government to rescue and liberate the children and to check the violation of human rights of children.

(ii) Right to education – Every child of the age of 6-14 years has the right to have free and compulsory education in the neighbourhood school till completion of elementary education.

Bachpan Bachao Andolan v. Union of India and others

Judgment dated 18.04.2011 passed by the Supreme Court in Writ Petition (C) No. 51 of 2006, reported in (2011) 5 SCC 1

Held:

The provisions of the Right of Children to Free and Compulsory Education Act, 2009 are material. By virtue of Section 3 of the Act, every child of the age of 6-14 years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education. The Central Government has notified the Act in the Gazette on 27.08.2009 and the Act has been brought into force with effect from 01.04.2010.

It may also be noted that Chapter 6 of the Act has special provisions for protection of the right of children. The National Commission for Protection of Child Rights has already been constituted. The said Commission now receives a statutory status by virtue of this Act. In view of the performance of the present National Commission for Protection of Child Rights, which has taken pioneering efforts, it is expected that on a close interface between the National Commission for Protection of Child Rights, the State Governments and the Ministry of Women and Child Development, positive outcomes should actually be worked out.

It is, therefore, necessary that a coordinated effort must be made by the three agencies, namely, the Commission, the Ministry and the State Governments. The learned Solicitor General submitted that the recommendations be implemented by the agencies concerned. In the State/ Union Territory, the responsibility must vest either in the Chief Secretary or a Secretary in charge of children, women

and family welfare. It would be open to the State Government in appropriate cases to nominate a Special Officer for the said purpose not lower than the rank of a Secretary to the State Government. Each State must issue a circular effectively indicating how the recommendations will be implemented.

We have carefully mentioned comprehensive submissions and suggestions given by the learned Solicitor General and others. We plan to deal with the problem of children's exploitation systematically. In this order we are limiting our directions regarding children working in the Indian circuses. Consequently, we direct:

(i) In order to implement the fundamental right of the children under Article 21-A it is imperative that the Central Government must issue suitable notifications prohibiting the employment of children in circuses within two months from today.

(ii) The respondents are directed to conduct simultaneous raids in all the circuses to liberate the children and check the violation of fundamental rights of the children. The rescued children be kept in the care and protective homes till they attain the age of 18 years.

(iii) The respondents are also directed to talk to the parents of the children and in case they are willing to take their children back to their homes, they may be directed to do so after proper verification.

(iv) The respondents are directed to frame proper scheme of rehabilitation of rescued children from circuses.

(v) We direct the Secretary of the Ministry of Human Resources Development, Department of Women and Child Development to file a comprehensive affidavit of compliance within ten weeks.

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***211. CONSTITUTION OF INDIA – Article 22 (1)**
CRIMINAL PROCEDURE CODE, 1973 – Section 303
Right of accused to be defended by a pleader of his choice – 'A' had filed Vakalatnama on behalf of accused – On the date fixed for evidence, 'A' moved an application for deferring the cross-examination of witnesses on the ground that accused wanted to be defended by 'R' – On the said day neither 'R' was present at the court nor any Vakalatnama filed on behalf of the accused – Besides, two witnesses were cross-examined by 'A' on the same day – On the next date fixed for evidence, 'A' refused to appear on behalf of accused – Accused expressed his inability to appoint a counsel – In the situation, trial court appointed 'G' to defend him on the State expense – Accused did not express any no-confidence on 'G' – 'G' cross-examined prosecution witnesses on behalf of accused and cross-examination showed that 'G' was competent to deal with the case – Held, in the given circumstances, it cannot be held that accused was not given sufficient opportunity to be defended by a pleader of his choice.

In Ref : Received from Additional Sessions Judge, Singrauli v. Santosh Kumar Singh

Judgment dated 24.03.2011 passed by the High Court of M.P. in Criminal Reference No. 4 of 2010 reported in 2011 (3) MPHT 155 (DB)

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212. CONSTITUTION OF INDIA – Article 51-A

Natural water resources, conservation and maintenance of – Water is one of the essential resources necessary for existence of life on earth – Now-a-days ground water level is going down due to misuse of water – Hence, it is the duty of all concerned authorities to work sincerely for the purpose of conservation and maintenance of ponds, tanks and lakes properly – Directions issued for this pious purpose.

Rinkesh Goyal v. State of M.P.

Judgment dated 10.03.2011 passed by the High Court of M.P. in W.P. No. 2708 of 2005 (PIL), reported in 2011 (2) MPLJ 618 (DB)

Held:

The natural resources are assets of entire nation as well as planet. There is no dispute in regard to the fact that water is one of the essential resources necessary for existence of life on the earth. Hon'ble the Supreme Court in *T.N. Godavarman Thirumulpad v. Union of India and others, (2006) 1 SCC 1,* has specifically emphasized the need and it is the obligation of all the persons including Government to conserve and not waste these resources and observed as under :–

> "Natural resources are the assets of the entire nation. It is the obligation of all concerned, including the Union Government and State Governments to conserve and not waste these resources. Article 48-A of the Constitution requires that the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. Under Article 51-A, it is the duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures."

Hon'ble the Supreme Court further in the case of *Jagpal Singh and others v. State of Punjab and others, 2011 AIR SCW 990,* has held, as under, in regard to management and conservation of water resources : –

> "16. The present is a case of land recorded as a village pond. This Court in *Hinch Lal Tiwari v. Kamala Devi, AIR 2001 SC 3215 (followed by the Madras High Court* in *L. Krishnan v. State of Tamil Nadu, AIR 2005 Mad. 311* held that land recorded as a pond must not be allowed to be allotted to anybody for construction of a house or any allied purpose. The Court ordered the respondents to vacate the

land they had illegally occupied, after taking away the material of the house. We pass a similar order in this case.

17. In this connection we wish to say that our ancestors were not fools. They knew that in certain years there may be droughts or water shortages for some other reason, and water was also required for cattle to drink and bathe in etc. Hence they built a pond attached to every village, a tank attached to every temple, etc. These were their traditional rain water harvesting methods, which, served them for thousands of years.

18. Over the last, few decades, most of these ponds in our country have been filled with earth and built upon by greedy people, thus destroying their original character. This has contributed to the water shortages in the country.

19. Also, many ponds are auctioned off at throw away prices to businessmen for fisheries in collusion with authorities/ Gram Panchayat officials, and even this money collected from these so called auctions are not used for the common benefit of the villagers but mis-appropriated by certain individuals. The time has come when these malpractices must stop."

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"22. Before parting with this case we give directions to all the State Governments in the country that they should prepare schemes for eviction of illegal/unauthorized occupants of Gram Sabha/Gram Panchayat/Poramboke/ Shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularizing the illegal possession. Regularization should only be permitted in exceptional cases e.g. where lease has been, granted under some Government notification to landless labourers or members of Scheduled Castes/ Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land.

23. Let a copy of this order be sent to all Chief Secretaries of all States and Union Territories in India who will ensure strict and prompt compliance of this order and submit compliance reports to this Court from time to time."

There is no dispute in regard to the fact that ground water level is going down due to misuse of water. Even though, proper steps have not been taken by the concerned authorities, may be, administrative authorities, local self bodies or other functionaries in ensuring proper management of ponds, tanks and lakes. However, it is the duty of all concerned authorities to work sincerely for the purpose of conservation and maintenance of ponds, tanks and lakes properly.

In this view of the matter, this petition is disposed of with the following directions : –

(1) That, in each divisional level a Committee be constituted under the chairmanship of Revenue Commissioner of the division to monitor the effective implementation of the water conservation schemes introduced by the Government for the aforesaid purpose.

(2) The committee shall also ensure that there should not be any encroachment over the land of ponds, tanks and lakes, and if, there is any encroachment that be removed immediately.

(3) The State Government shall take effective steps in regard to water harvesting and ground water level management so the problem of reducing the level of ground water could be tackled.

(4) A copy of the order be sent to the Chief Secretary of the State and also the Secretary, Revenue Department of the State.

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213. CONSTITUTION OF INDIA – Article 141
PREVENTION OF CORRUPTION ACT, 1988 – Section 19 (1) (c)
CRIMINAL PROCEDURE CODE, 1973 – Sections 190, 197 and 391

(i) Preliminary enquiry by the responsible police officer into the allegations of dishonesty against the public servant is the law of the land as declared by the Supreme Court.

(ii) Defect or irregularity in investigation or mere error, omission or irregularity in sanction is neither fatal nor vitiate the result unless it has resulted in failure of justice or has been occasioned thereby.

(iii) Additional evidence at the appellate stage is permissible in exceptional circumstances to remove irregularity just to meet the ends of justice and not to fill up lacunae.

Ashok Tshering Bhutia v. State of Sikkim

Judgment dated 25.02.2011 passed by the Supreme Court in Criminal Appeal No. 945 of 2003, reported in (2011) 4 SCC 402

Held:

(i) It was categarically held in *P. Sirajuddin v. State of Madras, AIR 1971 SC 520* and *State of Haryana v. Bhajan Lal, AIR 1992 SC 604* has categorically held that before a public servant is charged with an act of dishonesty which amounts to serious misdemeanour and an FIR is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The law declared by this Court is binding on everyone in view of the provisions of Article 141 of the Constitution, which would by all means override the statutory provisions of CrPC and such an irregularity is not curable nor does it fall within the ambit of Section 465 CrPC. However, the aforesaid observations do not lay down law of universal application.

(ii) The matter of investigation by an officer not authorised by law has been considered by this Court time and again and it has consistently been held that a defect or irregularity in investigation however serious, has no direct bearing on the competence or procedure relating to cognizance or trial and, therefore, where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless a miscarriage of justice has been caused thereby. The defect or irregularity in investigation has no bearing on the competence of the court or procedure relating to cognizance or trial. [*H.N. Rishbud v. State of Delhi, AIR 1955 SC 196, Munnalal v. State of U.P., AIR 1964 SC 28, Khandu Sonu Dhobi v. State of Maharashtra, AIR 1972 SC 958, State of M.P. v. Bhooraji, (2001) 7 SCC 679, State of M.P. v. Ramesh C. Sharma, (2005) 12 SCC 628* and *State of M.P. v. Virender Kumar Tripathi, (2009) 15 SCC 533*]

Same remained the position regarding sanction. In the absence of anything to show that any defect or irregularity therein caused a failure of justice, the plea is without substance. A failure of justice is relatable to error, omission or irregularity in the sanction. Therefore, a mere error, omission or irregularity in sanction is not considered to be fatal unless it has resulted in a failure of justice or has been occasioned thereby. Section 19 (1) of the PC Act, 1988 is a matter of procedure and does not go to the root of the jurisdiction and once the cognizance has been taken by the Court under CrPC, it cannot be said that an invalid police report is the foundation of jurisdiction of the court to take cognizance. [*Vide Kalpanath Rai v. State, (1997) 8 SCC 732, State of Orissa v. Mrutunjaya Panda, AIR 1998 SC 715, State v. T. Venkatesh Murthy, (2004) 7 SCC 763, Shankerbhai Laljibhai Rot v. State of Gujarat, (2004) 13 SCC 487, Parkash Singh Badal v. State of Punjab, AIR 2007 SC 1274* and *M.C. Mehta (Taj Corridor Scam) v. Union of India, AIR 2007 SC 1087*]

(iii) Additional evidence at the appellate stage is permissible, in case of failure of justice. However, such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the facts and circumstances of an individual case as to whether such permission should

be granted having due regard to the concepts of fair play, justice and the well-being of society. Such an application for taking additional evidence must be decided objectively, just to cure the irregularity.

The primary object of the provisions of Section 391 CrPC is the prevention of a guilty man's escape through some careless or ignorant action on part of the prosecution before the court or for vindication of an innocent person wrongfully accused, where the court omitted to record the circumstances essential to elucidation of truth. Generally, it should be invoked when formal proof for the prosecution is necessary. [Vide *Rajeshwar Prasad Misra v. State of W.B., AIR 1965 SC 1887, Ratilal Bhanji Mithani v. State of Maharashtra, AIR 1971 SC 1630, Rambhau v. State of Maharashtra, AIR 2001 SC 2120, Anil Sharma v. State of Jharkhand, AIR 2004 SC 2294, Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158* and *Manu Sharma v. State (NCT of Delhi), AIR 2010 SC 2352*]

This Court in *State of Gujarat v. Mohanlal Jitamalji Porwal, AIR 1987 SC 1321* dealing with the issue held as under:

> "To deny the opportunity to remove the formal defect was to abort a case against an alleged economic offender. Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions. The community or the State is not a *persona non grata* whose cause may be treated with disdain. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of the moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white-collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest."

In *Rambhau* (supra) a larger Bench of this Court held as under:

> "4. Incidentally, Section 391 forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of

justice. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a *de novo* trial. It is not to fill up the lacuna but to subserve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, Section 391 is thus akin to Order 41 Rule 27 of the Civil Procedure Code".

In view of the above, the law on the point can be summarized to the effect that additional evidence can be taken at the appellate stage in exceptional circumstances, to remove an irregularity, where the circumstances so warrant in public interest. Generally, such power is exercised to have formal proof of the documents, etc. just to meet the ends of justice. However, the provisions of Section 391 CrPC cannot be pressed into service in order to fill up lacunae in the prosecution case.

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***214. CONSTITUTION OF INDIA – Article 226**

Custodial death – Son of petitioner was tried for offence punishable under Section 302 I.P.C. and was on bail – Son of petitioner was convicted – He consumed poison immediately after pronouncement of judgment and died subsequently – Held, petitioner's son consumed poison before preparation of jail warrant – Respondents cannot be saddled with stigma of custodial death as accused was not taken over by police persons physically and police was not having *possidendi.*

Kaliram v. State of M.P. & Ors.

Judgment dated 24.01.2011 passed by the High Court of M.P. in W.P. No. 6368 of 2000, reported in ILR (2011) MP 1475

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***215. CRIMINAL PROCEDURE CODE, 1973 – Section 154**

Delay in lodging FIR

Incident of murder took place on 17.11.1986 at about 8.00 p.m. – Deceased was not found at the place of occurrence and informant with PW 1 was trying to locate the deceased throughout the night and only after tracing him from the nallah in the morning of 18.11.1986 and being sure of his death, filed the information immediately thereafter – Held, delay in filing FIR properly explained.

Gurudev Singh v. State of Madhya Pradesh

Judgment dated 10.05.2011 passed by the Supreme Court in Criminal Appeal No. 1125 of 2011, reported in (2011) 5 SCC 721

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216. CRIMINAL PROCEDURE CODE, 1973 – Sections 154 and 162

(i) More than one FIR in respect of same transaction, when permissible/not permissible – Reiterated.

(ii) Investigation into a criminal offence must be fair, unbiased and to bring out the real unfurnished truth and to be totally extricated from any extraneous influence as a vitiated investigation is the precursor of miscarriage of justice.

Babubhai v. State of Gujarat and others

Judgment dated 26.08.2010 passed by the Supreme Court in Criminal Appeal No. 1599 of 2010, reported in (2010) 12 SCC 254

Held:

An FIR under Section 154 CrPC is a very important document. It is the first information of a cognizable offence recorded by the officer in charge of the police station. It sets the machinery of criminal law in motion and marks the commencement of the investigation which ends with the formation of an opinion under Section 169 or 170 CrPC, as the case may be, and forwarding of a police report under Section 173 CrPC. Thus, it is quite possible that more than one piece of information be given to the police officer in charge of the police station in respect of the same incident involving one or more than one cognizable offences. In such a case, he need not enter each piece of information in the diary. All other information given orally or in writing after the commencement of the investigation into the facts mentioned in the first information report will be statements falling under Section 162 CrPC.

The court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is in the affirmative, the second FIR is liable to be quashed. However, in case, the contrary is proved, where the version in the second FIR is different and they are in respect of the two different incidents/crimes, the second FIR is permissible. In case in respect of the same incident the accused in the first FIR comes forward with a different version or counterclaim, investigation on both the FIRs has to be conducted.

(ii) The investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the investigating officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The investigating officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The investigating officer "is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth". (Vide *R.P. Kapur v. State of Punjab, AIR*

1960 SC 866, Jamuna Chaudhary v. State of Bihar, AIR 1974 SC 1822 and *Mahmood v. State of U.P., AIR 1976 SC 69*]

In *Navinchandra N. Majithia v. State of Meghalaya, AIR 2000 SC 3275* this Court considered a large number of its earlier judgments to the effect that investigating agencies are guardians of the liberty of innocent citizens. Therefore, a heavy responsibility devolves on them of seeing that innocent persons are not charged on an irresponsible and false implication. There cannot be any kind of interference or influence on the investigating agency and no one should be put through the harassment of a criminal trial unless there are good and substantial reasons for holding it. CrPC does not recognize a private investigating agency, though there is no bar for any person to hire a private agency and get the matter investigated at his own risk and cost. But such an investigation cannot be treaated as investigation made under law, nor can the evidence collected in such private investigation be presented by the Public Prosecutor in any criminal trial. Therefore, this Court emphasized on independence of the investigating agency and deprecated any kind of interference observing as under:

> "17. The above discussion was made for emphasizing the need for official investigation to be totally extricated from any extraneous influence. ..... All complaints shall be investigated with equal alacrity and with equal fairness irrespective of the financial capacity of the person lodging the complaint.
>
> 18. ..... A vitiated investigation is the precursor for miscarriage of criminal justice."

In *Nirmal Singh Kahlon v. State of Punjab, (2009) 1 SCC 441* this Court held that a concept of fair investigation and fair trial are concomitant to preservation of the fundamental right of the accused under Article 21 of the Constitution of India.

In *Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1* one of us (Hon'ble P. Sathasivam, J.) has elaborately dealt with the requirement of fair investigation observing as under:

> "197. ... The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.

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199. It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law dehors his position and influence in the society.

200. ... The court is not to accept the report which is *contra legem* but (sic) to conduct judicious and fair investigation....

201. ... The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and 21 and expansive power of the police to make investigation."

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217. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 and 161 EVIDENCE ACT, 1872 – Sections 8 and 9

(i) Delay in examination of a witness – Does not as a rule of universal application renders the prosecution case suspect and rejection of witness's testimony.

(ii) Deficiencies in investigation – Blood stained T-shirt and empty cartridges were not sent for examination – Such lapse is not sufficient to reject the version of eye witnesses.

(iii) Identification parade held for one witness – Failure to offer an explanation for not holding T.I. parade for other witnesses will not *ipso jure* prove fatal to the case of the prosecution – Identification in the court – What should be the weight attached to it – Will determine in the peculiar facts and circumstances of each case.

(iv) Proof of motive – Effect in direct evidence cases – If the version given by eye witnesses is credible, absence of evidence to prove the motive is rendered inconsequential – But proof of motive lends strength to prosecution case or for the Court in its ultimate conclusion.

Sheo Shankar Singh v. State of Jharkhand & Anr.

Judgment dated 15.02.2011, passed by the Supreme Court in Criminal Appeal No. 792 of 2005, reported in AIR 2011 SC 1403

Held:

Learned senior counsel for the appellants contended that Mr. Prasant Banerjee (PW-6) was not an eye-witness as he had come to the place of occurrence 7-8 minutes after the occurrence. He also argued that the witness had not made any statement to the police till 2nd June, 2000 which renders his story suspect. There is no doubt a delay of one and half months in the recording of statement of Prasant Banerjee (PW-6). The question is whether the same should by itself justify rejection of his testimony. Our answer is in the negative. The legal position is well settled that mere delay in the examination of a particular witness does not, as a rule of universal application, render the prosecution case suspect. It depends upon circumstances of the case and the nature of the offence that is being investigated. It would also depend upon the availability of information by which the investigating officer could reach the witness and examine him. It would also depend upon the explanation, if any, which the investigating officer may offer for the delay. In a case where the investigating officer has reasons to believe that a particular witness is an eye-witness to the occurrence but he does not examine him without any possible explanation for any such omission, the delay may assume importance and require the Court to closely scrutinize and evaluate the version of the witness but in a case where the investigating officer had no such information about any particular individual being an eye-witness to the occurrence, mere delay in examining such a witness would not ipso facto render the testimony of the witness suspect or affect the prosecution version. We are supported in this view by the decision of this Court in *Ranbir and Ors. v. State of Punjab, AIR 1973 SC 1409* where this Court examined the effect of delayed examination of a witness and observed:

> "..... The question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a got-up witness to falsely support the prosecution case. It is, therefore, essential that the "Investigating Officer should be asked specifically about the delay and the reasons therefore...."

Again in *Satbir Singh and Ors. v. State of Uttar Pradesh, AIR 2009 SC 2163* the delay in the examination of the witness was held to be not fatal to the prosecution case. This Court observed:

> "32. Contention of Mr. Sushil Kumar that the Investigating Officer did not examine some of the witnesses on 27th January, 1997 cannot be accepted for more than one reason firstly, because the delay in the investigation itself may not benefit the accused; secondly, because the Investigating Officer (PW 8) in his deposition explained the reasons for delayed examination of the witnesses....."

In *Ram Bihari Yadav v. State of Bihar and Ors., AIR 1998 SC 1850,* this Court while dealing with the effect of shoddy investigation of cases held that if primacy was given to such negligent investigation or to the omissions and lapses committed in the course of investigation, it will shake the confidence of the people not only in the law enforcing agency but also in the administration of justice. The same view was expressed by this Court in *Surendra Paswan v. State of Jharkhand, AIR 2004 SC 742.* In that case the investigating officer had not sent the blood samples collected from the spot for chemical examination. This Court held that merely because the sample was not so sent may constitute a deficiency in the investigation but the same did not corrode the evidentiary value of the eye-witnesses.

In *Amar Singh v. Balwinder Singh and Ors., AIR 2003 SC 1164* the investigating agency had not sent the firearm and the empties to the forensic science laboratory for comparison. It was argued on behalf of the defence that omission was a major flaw in the prosecution case sufficient to discredit prosecution version. This Court, however, repelled that contention and held that in a case where the investigation is found to be defective the Court has to be more circumspect in evaluating the evidence. But it would not be right to completely throw out the prosecution case on account of any such defects, for doing so would amount to playing in the hands of the investigating officer who may have kept the investigation designedly defective. This Court said:

> "It would have been certainly better if the investigating agency had sent the firearms and the empties to the Forensic Science Laboratory for comparison. However, the report of the ballistic expert would in any case be in the nature of an expert opinion and the same is not conclusive. The failure of the investigating officer in sending the firearms and the empties for comparison cannot completely throw out the prosecution case when the same is fully established from the testimony of eye-witnesses whose presence on the spot cannot be doubted as they all received gunshot injuries in the incident."

We remain content with a reference to the following observations made by this Court in *Malkhansingh and Ors. v. State of M.P., AIR 2003 SC 2669:*

> "It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very

nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad v. Delhi Admn., AIR 1958 SC 350, Vaikuntam Chandrappa v. State of A.P., AIR 1960 SC 1340, Budhsen v. State of U.P. (1970) 2 SCC 128 : (AIR 1970 SC 1321)* and *Rameshwar Singh v. State of J&K. (1971) 2 SCC 715) : (AIR 1972 SC 102).*"

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218. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 and 173

(i) Investigation – Redirected to independent agency like CBI, even after filing of charge sheet by the Apex Court or High Court.

(ii) In which Court submission of final report by CBI is to be done? Held, it should be the Court in which the chargesheet is filed – That Court should deal with all matters pertaining to trial of accused and matters relating to Section 173 (8) of the Code in accordance with law.

Narmada Bai v. State of Gujarat and Ors.

Judgment dated 08.04.2011, passed by the Supreme Court in Writ Petition (Criminal) No. 115 of 2007, reported in AIR 2011 SC 1804

Held:

In *Md. Anis v. Union of India and Ors., 1994 Supp (1) SCC 145,* it has been observed by this Court that:

> "5..... Fair and impartial investigation by an independent agency, not involved in the controversy is the demand of public interest. If the investigation is by an agency, which is allegedly privy to the dispute, the credibility of the investigation will be doubted and that will be contrary to the public interest as well as the interest of justice....."
>
> "2..... Doubts were expressed regarding fairness of investigation as it was feared that as the local police was alleged to be involved in the encounter, the investigation by an officer of the UP Cadre may not be impartial....."

In another decision of this Court in *R.S. Sodhi v. State of U.P. & Ors., AIR 1994 SC 38,* the following conclusion is relevant :

> "2..... We have perused the events that have taken place since the incidents but we are refraining from entering upon the details thereof lest it may prejudice any party but we think that since the accusations are directed against the local police personnel it would be desirable to entrust the investigation to an independent agency like the Central Bureau of Investigation so that all concerned including the relatives of the deceased may feel assured that an independent agency is looking into the matter and that would lend the final outcome of the investigation credibility. However faithfully the local police may carry out the investigation, the same will lack credibility since the allegations are against them. It is only with that in mind that we having thought it both advisable and desirable as well as in the interest of justice to entrust the investigation to the Central Bureau of Investigation forthwith and we do hope that it would complete the investigation at an early date so that those involved in the occurrences, one way or the other, may be brought to book. We direct accordingly....."

In both these decisions, this Court refrained from expressing any opinion on the allegations made by either side but thought it wise to have the incident investigated by an independent agency like the CBI so that it may bear credibility. This Court felt that no matter how faithfully and honestly the local police may carry out the investigation, the same will lack credibility as allegations were directed against them. This Court, therefore, thought it both desirable and advisable and in the interest of justice to entrust the investigation to the CBI so that it may complete the investigation at an early date. It was clearly stated that in so ordering no reflection either on the local police of the State Government was intended. This Court merely acted in public interest.

The above decisions and the principles stated therein have been referred to and followed by this Court in *Rubbabuddin Sheikh State of Gujarat & Ors.,*

AIR 2010 SC 3175 where also it was held that considering the fact that the allegations have been levelled against higher level police officers, despite the investigation made by the police authorities of the State of Gujarat, ordered investigation by the CBI. Without entering into the allegations levelled by either of the parties, we are of the view that it would be prudent and advisable to transfer the investigation to an independent agency. It is trite law that accused persons do not have a say in the matter of appointment of an investigation agency. The accused persons cannot choose as to which investigation agency must investigate the alleged offence committed by them.

The other question relates to submission of a report by the CBI to this Court and further monitoring in the case. Though in *Rubabbudin Sheikh's* case (supra), this Court directed the CBI that after investigation agency submits a report to this Court and thereafter, further necessary orders will be passed in accordance with the said report, in view of the principles laid down in series of decisions by this Court, we are not persuaded to accept the course relating to submission of report to this court and monitoring thereafter.

> a) In *Vineet Narain, AIR 1996 SC 3386,* this Court held as under :
>
> "In case of persons against whom a *prima facie* case is made out and a charge-sheet is filed in the competent court, it is that court which will then deal with that case on merits, in accordance with law."
>
> b) In *Sushil Kumar Modi, AIR 1997 SC 1672,* this Court observed that the monitoring process in the High Court in respect of the particular matter had come to an end with the filing of the charge-sheet in the Special Court and the matter relating to execution of the warrant issued by the Special Court against Shri Laloo Prasad Yadav was a matter only within the competence of the Special Court so that there was no occasion for the High Court to be involved in any manner with the execution of the warrant. By relying on decision in *Vineet Narain's case* (supra), this Court reiterated that once a charge-sheet is filed in the competent court after completion of the investigation, the process of monitoring by this Court for the purpose of making the CBI and other investigating agencies concerned perform their function of investigating into the offences concerned comes to an end; and thereafter it is only the court in which the charge-sheet is filed which is to deal with all matters relating to the trial of the accused, including matters falling within the scope of Section 173(8) of the Code.

c) In *M.C. Mehta (Taj Corridor Scam) v. Union of India and others, AIR 2007 SC 1087,* this Court again reiterated the same principle. The following conclusion is relevant :

"30. At the outset, we may state that this Court has repeatedly emphasized in the above judgments that in Supreme Court monitored cases this court is concerned with ensuring proper and honest performance of its duty by CBI and that this Court is not concerned with the merits of the accusations in investigation, which are to be determined at the trial on the filing of the charge-sheet in the competent court, according to the ordinary procedure prescribed by law... ....."

After saying so, this Court concluded :

"34. We, accordingly, direct CBI to place the evidence/ material collected by the investigating team along with the report of the SP as required under Section 173 (2), Cr.P.C. before the Court/Special Judge concerned who will decide the matter in accordance with law."

The above decisions make it clear that though this Court is competent to entrust the investigation to any independent agency, once the investigating agency complete their function of investigating into the offences, it is the Court in which the charge-sheet is filed which is to deal with all matters relating to the trial of the accused including matters falling within the scope of Section 173 (8) of the Code. Thus, generally, this Court may not require further monitoring of the case/investigation. However, we make it clear that if any of the parties including the CBI require any further direction, they are free to approach this Court by way of an application.

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219. CRIMINAL PROCEDURE CODE, 1973 – Sections 178 and 179

Place of inquiry or trial – Proceedings under Section 498-A IPC – Specific allegation by wife about cruelty at hands of husband and his relatives at Ranchi – Her husband has taken him to her parental home at Gaya with a threat of dire consequences for not fulfilling their demand of dowry – In the light of Sections 178 and 179 offence was a continuing one having been committed in more than one local areas – One of the local areas being Gaya, so Magistrate at Gaya has jurisdiction to proceed with criminal case instituted therein – In such a continuing offence Section 178 Clause (c) attracted.

Sunita Kumari Kashyap v. State of Bihar & Anr.

Judgment dated 11.04.2011, passed by the Supreme Court in Criminal Appeal No. 917 of 2011, reported in AIR 2011 SC 1674

Held:

We have already adverted to the details made by the appellant in the

complaint. In view of the specific assertion by the appellant-wife about the ill-treatment and cruelty at the hands of the husband and his relatives at Ranchi and of the fact that because of their action, she was taken to her parental home at Gaya by her husband with a threat of dire consequences for not fulfilling their demand of dowry, we hold that in view of Sections 178 and 179 of the Code, the offence in this case was a continuing one having been committed in more local areas and one of the local areas being Gaya, the learned Magistrate at Gaya has jurisdiction to proceed with the criminal case instituted therein. In other words, the offence was a continuing one and the episode at Gaya was only a consequence of continuing offence of harassment of ill-treatment meted out to the complainant, clause (c) of Section 178 is attracted. Further, from the allegations in the complaint, it appears to us that it is a continuing offence of ill-treatment and humiliation meted out to the appellant in the hands of all the accused persons and in such continuing offence, on some occasion all had taken part and on other occasion one of the accused, namely, husband had taken part, therefore, undoubtedly clause (c) of Section 178 of the Code is clearly attracted.

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220. CRIMINAL PROCEDURE CODE, 1973 – Section 223 (d)
INDIAN PENAL CODE, 1860 – Section 149

Cross cases – Procedure in respect of cross cases explained.

When two criminal cases, wherein the prosecution versions are materially different, contradictory and mutually exclusive are submitted in a Court, then they should be tried together but not consolidated – If these two cases are arising out of the same incident by way of two FIRs, the investigating officer should bring this fact to the notice of the trial Judge to avoid gross injustice to the parties concerned.

Kuldip Yadav and others v. State of Bihar

Judgment dated 11.04.2011 passed by the Supreme Court in Criminal Appeal No. 531 of 2005, reported in (2011) 5 SCC 324

Held:

In order to understand the above issue, it is useful to refer to Section 223 (d) of the Code which reads as under:

> *"223. What persons may be charged jointly.* – The following persons may be charged and tried together, namely:
>
> (a)-(c) ★ ★ ★
>
> (d) persons accused of different offences committed in the course of the same transaction;
>
> (e)-(g) ★ ★ ★

The above provision has been interpreted by this Court in the following decision. In *Harjinder Singh v. State of Punjab, (1985) 1 SCC 422* the question before the Court was whether under Section 223 of the Code it is permissible for the Court to club and consolidate the case on a police challan and the case on a complaint where the prosecution versions in the police challan case and the complaint case are materially different, contradictory and mutually exclusive. The question was whether the Court should in the facts and circumstances of the case direct that the two cases should be tried together but not consolidated i.e. the evidence be recorded separately in both cases and they may be disposed of simultaneously except to the extent that the witnesses for the prosecution which are common to both may be examined in one case and their evidence be read as evidence in the other.

After analyzing the factual details, this Court has concluded : [*Harjinder Singh case* (supra)]

> "8. In the facts and circumstances of this particular case we feel that the proper course to adopt is to direct that the two cases should be tried together by the learned Additional Sessions Judge but not consolidated i.e. the evidence should be recorded separately in both the cases one after the other except to the extent that the witnesses for the prosecution who are common to both the case be examined in one case and their evidence be read as evidence in the other. The learned Additional Sessions Judge should after recording the evidence of the prosecution witnesses in one case, withhold his judgment and then proceed to record the evidence of the prosecution in the other case. Thereafter he shall proceed to simultaneously dispose of the cases by two separate judgments taking care that the judgment in one case is not based on the evidence recorded in the other case."

In *Balbir v. State of Haryana, (2000) 1 SCC 285* this Court considered clauses (a) and (d) of Section 223 of the Code and held that :

> " ..... the primary condition is that persons should have been accused either of the same offence or of different offences 'committed in the course of the same transaction'. The expression advisedly used is 'in the course of the same transaction'. That expression is not akin to saying 'in respect of the same subject-matter'. For several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or design, where

there is a continuity of action, then all those persons involved can be accused of the same or different offences 'committed in the course of the same transaction'."

In *Lalu Prasad v. State, (2003) 11 SCC 786* this Court held that amalgamation of cases under Section 223 is discretionary on the part of the trial Magistrate and he has to be satisfied that persons would not be prejudicially affected and that it is expedient to amalgamate cases.

Regarding the argument based on Section 210(2) of the Code, it is useful to refer to the decision of this Court in *Pal v. State of U.P., (2010) 10 SCC 123* which reads as under :

> "27. Sub-section (2) of Section 210 provides that if a report is made by the investigating officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person, who is an accused in a complaint case, the Magistrate shall inquire into or try the two cases together, as if both the cases had been instituted on a police report. Sub-section (3) provides that if the police report does not relate to any accused in the complaint case, or if the Magistrate does not take cognizance of any offence on a police report, he shall proceed with the inquiry or trial which was stayed by him, in accordance with the provisions of the Code.
>
> 28. Although it will appear from the above that under Section 210 CrPC, the Magistrate may try the two cases arising out of a police report and a private complaint together, the same, in our view, contemplates a situation where having taken cognizance of an offence in respect of an accused in a complaint case, in a separate police investigation such a person is again made an accused, then the Magistrate may inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report. That, however, is not the fact situation in the instant case, since the accused are different in the two separate proceedings and the situation has, in fact, arisen where prejudice in all possibility is likely to be caused in a single trial where a person is both an accused and a witness in view of the two separate proceedings out of which the trial arises.
>
> ★ ★ ★
>
> 30. ... As was observed in *Harijinder Singh* (supra) case clubbing and consolidating the two cases, one on a police challan and the other on a complaint, if the prosecution

versions in the two cases are materially different, contradictory and mutually exclusive, should not be consolidated but should be tried together with the evidence in the two cases being recorded separately, so that both the cases could be disposed of simultaneously."

In case on hand, we have already noted that the investigation was conducted by the same IO in respect of the incident that took place on 28-4-1997 at Khalihan. Though in the cross-case, that is, FIR No. 12 of 1997, a complaint was made on the next day i.e. on 29-4-1997 at about 5.30 a.m., from the materials available, both the cases relate to the incident that took place at 9 a.m. on 28-4-1997 which is also clear from the following information:

FIR No. 11 of 1997, PS Govindpur	**FIR No. 12 of 1997, PS Govindpur**
Informant Naresh Yadav (PW9)	Informant Sunil Yadav (A-9 in FIR No. 11 of 1997)
Charge-sheet submitted on 30-6-1997 Charge was framed on 19-3-1999 Date of judgment of the trial court: 27-6-2000	Charge-sheet submitted on17-12-1997 Date of judgment of the trial court: 18-11-2009
Accused persons	Accused persons
1. Brahamdeo Yadav alias Bhonu Yadav (gun) 2. Darogl Mahto (gun) 3. Maho Yadav (gun) 4. Sunil Yadav s/o Bale Yadav (gun) 5. Paro Mahto (lathi) 6. Kuldeep Yadav (gandasa) 7. Sudhir Yadav (bhala) 8. Bale Yadav (gandasa) 9. Sunil Yadav s/o Musafir Yadav (saif) (Informant in FIR no. 12 of 1997) 10. Shiv Nandan Yadav (gandasa) 11. Suraj Yadav (bhala)	1. Upendra Yadav (pistol) 2. Rambalak Yadav (gun) 3. Basudev Yadav (gandasa) 4. Anil Yadav (gandasa) 5. Bindeshwar Yadav alias Manager Yadav (gandasa) 6. Ganauri Yadav (gandasa) 7. Damodar Yadav (stick) 8. Suresh Yadav (stick) 9. Umesh Yadav (stick) 10. Muni Yadav (gandasa) 11. Naresh Yadav (gandasa)
Injury to deceased Suresh 1. An oral lacerated wound of ½" diameter with inverted and charred margin, ½" right to umbilicus of uncertain depth i.e. wound of entry. 2. Multiple bruises of size 3" x 2" to 1" x ½" four in number over back, right lower chest and abdomen.	

Injured persons	Injured persons
1. PW 3 Ganauri Yadav (A-6 in FIR No. 12 of 1997) 2. PW 4 Bindeshwar Yadav alias Manager Yadav (A-5 in FIR No. 12 of 1997) 3. PW 7 Munshi Yadav (A -10 in FIR No. 12 of 1997) 4. PW 9 Naresh Yadav (A-11 in FIR No. 12 of 1997)	1. Brahamdeo Yadav alias Bhonu Yadav (A-1 in FIR No. 11 of 1997) 2. Sunil Yadav (A-9 in FIR No. 11 of 1997) 3. Musafir Yadav

In view of the above factual details coupled with the statements made by the prosecution witnesses and in the light of the principles enunciated by this Court, the investigating officer ought to have brought to the notice of the trial Judge about the two FIRs arising out of the same incident to avoid gross injustice to the parties concerned.

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***221. CRIMINAL PROCEDURE CODE, 1973 – Section 273**

Evidence to be taken in presence of accused – Evidence recorded in trial of co-accused cannot be utilized in trial of absconding accused who subsequently appeared before the Court and is facing trial before the same Court and that evidence whatever may be, cannot be accepted against absconding accused.

Jitendra Goyal v. State of M.P & Anr.

Judgment dated 03.03.2011 passed by the High Court of M.P. in M. Cr. C. No. 1286 of 2011, reported in ILR (2011) MP 1610

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222. CRIMINAL PROCEDURE CODE, 1973 – Section 299 (1) and (2)

When prosecution may rely on evidence recorded in earlier trial against co-accused? Held, the evidence may be used subject to establishment of existence of any of the conditions precedent as prescribed in Section 299 CrPC.

Central Bureau of Investigation v. Abu Salem Ansari and another

Judgment dated 06.02.2009 passed by the Supreme Court in Criminal Appeal No. 328 of 2009, reported in (2011) 4 SCC 426

Held:

The first respondent is an accused in a case pending before the Designated Court in Bombay under the TADA Act. It appears that the first respondent was absconding and was arrested in a foreign country. He was extradited and brought to India on 11.11.2005 and by that time the trial of the other accused was over.

The prosecution wanted to rely on the evidence recorded by the Designated Court in the earlier trial conducted wherein the first respondent was not present

as an accused. By the impugned order, the learned Judge, Designated Court, held that the prosecution may rely on the earlier evidence recorded in the earlier trial against the first respondent subject to establishment of existence of any of conditions precedent as described in second part of Section 299 of the Code of Criminal Procedure (Cr.P.C.). This order is challenged before us by CBI.

Section 299 CrPC reads as under :

> *"299. Record of evidence in absence of accused.* – (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the court competent to try or commit for trial, such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.
>
> (2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the First Class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits on India."

As regards the first respondent, sub-section (1) of Section 299 would apply as he, an accused person, was absconding, his case is already split up and has to undergo the trial. Obviously, the evidence adduced in the earlier trial cannot be used against the first respondent except as provided in sub-section (1) of Section 299 CrPC. In the circumstances if the absconding accused appears again, the prosecution witnesses have to be examined afresh. But, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience, the prosecution would be justified in relying on the evidence already on record taken in the earlier trial in the absence of the absconding accused.

In the present case, sub-section (2) of Section 299 CrPC has no application. Therefore, we make it clear that the prosecution may rely on the earlier evidence recorded in the earlier trial against the first respondent subject to establishment

of existence of any of the conditions precedent as described in first part of Section 299 CrPC.

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223. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 and 439
Cancellation of bail – Grounds therefor – Held, very cogent and overwhelming circumstances are necessary for order directing cancellation of bail already granted.

Central Bureau of Investigation, Hyderabad v. Subramani Gopalakrishnan and another
Judgment dated 21.04.2011 passed by the Supreme Court in Criminal Appeal No. 985 of 2011, reported in (2011) 5 SCC 296

Held:

It is also relevant to note that there is difference between yardsticks for cancellation of bail and appeal against the order granting bail. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted. Generally speaking, the grounds for cancellation of bail are, interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concessions granted to the accused in any manner. These are all only few illustrative materials. The satisfaction of the court on the basis of the materials placed on record of the possibility of the accused absconding is another reason justifying the cancellation of bail. In other words, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial.

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224. CRIMINAL TRIAL:
EVIDENCE ACT, 1872 – Section 118
OATHS ACT, 1873 – Section 5
Child witness

(i) Every witness is competent to depose unless the Court considers that he is prevented from understanding the question put to him or from giving rational answers by reason of tender age, extreme old age, disease; whether of body or mind or any other cause of the same kind – There is always competency in fact unless the Court considers it otherwise.

(ii) Court may rely upon the evidence of child witness in case his disposition inspires confidence of Court and there is no embellishment or improvements – Court can reject his/her statement partly or fully only in case where there is evidence on record to show that the child has been tutored.

State of Madhya Pradesh v. Ramesh and another

Judgment dated 18.03.2011 passed by the Supreme Court in Criminal Appeal No. 1289 of 2005, reported in (2011) 4 SCC 786

Held:

In *Rameshwar v. State of Rajasthan, AIR 1952 SC 54* this Court examined the provisions of Section 5 of the Oaths Act, 1873 and Section 118 of the Evidence Act, 1872 and held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the court considers otherwise. The Court further held as under:

> "11. ... it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate."

In *Mangoo v. State of M.P., AIR 1995 SC 959,* this court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

In *Panchhi v. State of U.P., AIR 1998 SC 2726,* this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that

> "the evidence of a child witness would always stand irretrievably stigmatised. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring"

In *Nivrutti Pandurang Kokate v. State of Maharashtra, AIR 2008 SC 1460* following the observation made in *Ratansinh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64,* it was held as under:

> "The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him. (Vide *Himmat Sukhadeo Wahurwagh v. State of Maharashtra, AIR 2009 SC 2292*).

In *State of U.P. v. Krishna Master, AIR 2010 SC 3071* this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such

remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. [Vide *Gagan Kanojia v. State of Punjab, (2006) 13 SCC 516.*]

In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

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***225. CRIMINAL TRIAL:**

(i) *Credibility of injured witness – The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted.*

His statement is generally considered to be very reliable and it is unlikely that he would spare the actual assailant in order to falsely implicate someone else – The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence – Thus, the testimony of an injured witness is accorded a special status in law – The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence – Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein.

(ii) *Appreciation of evidence – Principles regarding contradictions, inconsistencies and exaggerations and embellishments restated.*

In all criminal cases, normal discrepancies are bound to occur in the depositions due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence – Where the omissions amount to contradictions, in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon – However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of

the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety – The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. Exaggerations *per se* do not render the evidence brittle – But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility – Mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier.

(iii) *Effect of not naming the accused in FIR restated.*
It is a settled legal proposition that an FIR is not an encyclopaedia of the entire case – It may not and need not contain all the details – Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy – The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has falsely been implicated – The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from this – Some people may miss even the most important details in narration – Therefore, incase the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused. [Vide *Rotash v. State of Rajasthan, (2006) 12 SCC 64* and *Ranjit Singh v. State of M.P., (2011) 4 SCC 336*]

State of Uttar Pradesh v. Naresh and others
Judgment dated 08.03.2011 passed by the Supreme Court in Criminal Appeal No. 674 of 2006, reported in (2011) 4 SCC 324

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226. CRIMINAL TRIAL:
Identification by voice – The evidence of voice identification is at best suspect if not, wholly unreliable – Accurate voice identification is much more difficult than visual identification – It is prone to such extensive and sophisticated tampering, doctoring and editing that the reality can be completely replaced by fiction – Therefore, the Courts have to be extremely cautious in basing a conviction purely on the evidence of voice identification – Apart from that, it should be kept in mind that tape recorded evidence can only be used as a corroborated evidence – The importance of the precautions which are necessary to be taken in placing any reliance on evidence of voice identification restated.

Nilesh Dinkar Paradkar v. State of Maharashtra

Judgment dated 09.03.2011 passed by the Supreme Court in Criminal Appeal No. 537 of 2009, reported in (2011) 4 SCC 143

Held:

This Court, in a number of judgments emphasized the importance of the precautions, which are necessary to be taken in placing any reliance on the evidence of voice identification.

In *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, (1976) 2 SCC 17*, this Court made following observations:

> "19. We think that the High Court was quite right in holding that the tape-records of speeches were 'documents', as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs. And that they were admissible in evidence on satisfying the following conditions:
>
> (a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.
>
> (b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to there so as to rule out possibilities of tampering with the record.
>
> (c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."

In *Ram Singh v. Col. Ram Singh, 1985 Supp SCC 611*, again this Court stated some of the conditions necessary for admissibility of tape-recorded statements, as follows:

> "(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.
>
> (2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence – direct or circumstantial.
>
> (3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may

render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rule of the Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."

In *Ram Singh's case* (supra) this Court also notices with approval the observations made by the Court of Appeal in England in *R. v. Maqsud Ali, (1965) 2 All ER 464.* In the aforesaid case, Marshall, J. observed thus:

> "..... We can see no difference in principle between a tape recording and a photograph. In saying this we must not be taken a saying that such a recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged."

To the same effect is the judgment in *R. v. Robson, (1972) 2 All ER 699,* which has also been approved by this Court in *Ram Singh's* case (supra). In this judgment, Shaw, J delivering the judgment of the Central Criminal Court observed as follows:

> "... The determination of the question is rendered the more difficult, because tape recordings may be altered by the transposition, excision and insertion of words or phrases and such alterations may escape detection and even elude it on examination by technical experts."

Chapter 14 of Archbold Criminal Pleading, Evidence and Practice, 2010 Edn. at pp. 1590-91 discusses the law in England with regard to evidence of identification. Section 1 of this Chapter deals with visual identification and Section 2 relates to voice identification. Here again, it is emphasizes that voice identification is more difficult than visual identification. Therefore, the precautions to be observed should be even more stringent than the precautions which ought to be taken in relation to visual identification. Speaking of lay listeners (including police officers), it enumerates the factors which would be relevant to judge the ability of such lay listener to correctly identify the voices. These factors include:

"(a) the quality of the recording of the disputed voice,

(b) the gap in time between the listener hearing the known voice and his attempt to recognize the disputed voice.

(c) the ability of the individual to identify voices in general (research showing that this varies from person to person),

(d) the nature and duration of the speech which is sought to be identified, and

(e) the familiarity of the listener with the known voice; and even a confident recognition of a familiar voice by a way listener may nevertheless be wrong."

The Court of Appeal in *England in R. v. Chenia. (2004) 1 All ER 543 and R. v. Flynn, 2008 EWCA Cri 970* has reiterated the minimum safeguards which are required to be observed before a court can place any reliance on the voice identification evidence, as follows:

"(a) the voice recognition exercise should be carried out by someone other than the officer investigating the offence;

(b) proper records should be kept of the amount of time spent in contact with the suspect by any officer giving voice recognition evidence, of the date and time spent by any such officer in compiling any transcript of a covert recording, and of any annotations on a transcript made by a listening officer as to his views as to the identity of a speaker; and

(c) any officer attempting a voice recognition exercise should not be provided with a transcript bearing the annotations of any other officer."

In America, similar safeguards have been evolved through a series of judgments of different courts. The principles evolved have been summed up in *American Jurisprudence 2d* (Vol. 29) in regard to the admissibility of tape-recorded statements, which are stated as under:

> "The cases are in general agreement as to what constitutes a proper foundation for the admission of a sound recording, and indicate a reasonably strict adherence to the rules prescribed for testing the admissibility of recordings, which have been outlined as follows:
>
> (1) a showing that the recording device was capable of taking testimony;
>
> (2) a showing that the operator of the device was competent;
>
> (3) establishment of the authenticity and correctness of the recording;
>
> (4) a showing that changes, additions, or deletions have not been made;

(5) a showing of the manner of the preservation of the recording;

(6) identification of the speakers; and

(7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

.... However, the recording may be rejected if it is so inaudible and indistinct that the jury must speculate as to what was said."

This apart, in *Mahabir Prasad Verma v. Dr. Surinder Kaur, (1982) 2 SCC 258,* this Court has laid down that tape-recorded evidence can only be used as corroboration evidence. In SCC para 22, it is observed as follows:

"22. ....Tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation and in the absence of evidence of any such conversation, the tape-recorded conversation is indeed no proper evidence and cannot be relied upon. In the instant case, there was no evidence of any such conversation between the tenant and the husband of the landlady; and in the absence of any such conversation, the tape-recorded conversation could be no proper evidence."

In our opinion, the evidence of voice identification is at best suspect if not, wholly unreliable. Accurate voice identification is much more difficult than visual identification. It is prone to such extensive and sophisticated tampering, doctoring and editing that the reality can be completely replaced by fiction. Therefore, the courts have to be extremely cautious in basing a conviction purely on the evidence of voice identification.

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***227. CRIMINAL TRIAL:**

Identification of dead body/*corpus delicti* – For identification of dead body/*corpus delicti*, scientific methods of (i) DNA fingerprinting; (ii) Dental examination; and (iii) Super-imposition technique were applied – On the basis of circumstantial evidence, the body parts recovered from different places were found belonged to one person only, namely, the deceased.

Inspector of Police, Tamil Nadu v. John David

Judgment dated 20.04.2011 passed by the Supreme Court in Criminal Appeal No. 384 of 2002, reported in (2011) 5 SCC 509

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228. EVIDENCE ACT, 1872 – Section 3

Child witness – If there is no inherent defect in testimony of child witness, merely because the witness is a child, her testimony cannot be disbelieved – Evidence of daughter of appellant duly corroborated by medical evidence – No material to show that she was tutored by any person – Evidence of child witness worth reliable.

Ramkishun v. State of M.P.

Judgment dated 16.11.2010 passed by the High Court of M.P. in Criminal Appeal No. 557 of 2002, reported in ILR (2011) M.P. 1277 (DB)

Held:

The Supreme Court in *Ratansinh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64* has held that if there is no inherent defect in the testimony of a child witness, merely because the witness is a child, her testimony cannot be disbelieved. According to us, in order to rely on the testimony of a child witness it is to be gathered by scrutinizing his or her testimony as to whether he or she is a tutored witness and is concealing the reality or not and if on both the tests the hallmark of the testimony of child witness is proven, there is no bar under the law to disbelieve his or her statement on account of the fact that the witness is a child. In this context reliance has been rightly placed by the learned Public Prosecutor, on the latest pronouncement *Rameshbhai Chandubhai Rathod v. State of Gujarat, 2009 (3) Supreme 585* wherein in paras 12 and 13 it has been held as under:-

> "12. Even earlier than that, this Court in *Dattu Ramrao Sakhare and others vs. State of Maharashtra, (1997) 5 SCC 341,* has held that there is no rule of practice that the evidence of a child witness needs corroboration in order to base conviction on it. However, as a rule of prudence, the Court insists it is desirable to have corroboration from other dependable evidence.
>
> 13. In *Suryanarayana v. State of Karnataka, (2001) 9 SCC 129,* this Court held that corroboration of the testimony of a child witness is not a rule but is a measure of caution and prudence."

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229. EVIDENCE ACT, 1872 – Sections 32 and 3

INDIAN PENAL CODE, 1860 – Section 300

(i) Dying declaration – Not in question and answer form and absence of certificate of fitness by doctor – That would not render the dying declaration unreliable – The certification by doctor is a rule of caution, which has been duly observed by the Tehsildar/Magistrate, who recorded the statement.

(ii) Appreciation of evidence – Medical evidence and direct evidence – Inconsistent – PW2 and PW3 have stated that the appellant had fired only once from his licensed double barreled gun – Dr. PW5 and PW10 have stated that deceased had suffered multiple gunshot injuries – After due appreciation, in light of medical jurisprudence, there is no inconsistency found by Trial Court – It is proper.

(iii) Murder trial – Appreciation of evidence – Both the direct witness described incident graphically and their testimony has been duly corroborated by dying declaration and the medical evidence – Finding upheld – Does not call for any interference.

Om Pal Singh v. State of U.P.

Judgment dated 09.11.2010, passed by the Supreme Court in Criminal Appeal No. 973 of 2003, reported in AIR 2011 SC 1562

Held:

The trial court as well as the High Court have also considered the submissions as to whether injury No. 9 was inconsistent with the ocular versions that only one shot was fired by the appellant. It was also sought to be submitted before us that injury No. 9 is definitely from a different weapon. This according to Senior Advocate for the Respondent would clearly show that the genesis of the crime has been suppressed by the prosecution. The trial court as well as the High Court, upon consideration of the same submission have concluded that both the doctors examined i.e. PW-5 and PW-10 were not ballistic experts. They were not able to state as to whether the injuries were caused by a single shot from a double-barrelled gun. Relying on *"Modi's Medical Jurisprudence and Toxicology"* (19th Ed. Pg. 221), the trial court has concluded that when a projectile strikes the body at a right angle, it is circular and oval when it strikes the body obliquely. Dr. V.P. Kulshrestha, PW – 5, in his injury report has stated that injury No. (i) is 2 cm x 2 cm muscle deep and is on right shoulder. According to him, if this pellet had moved slightly to the inner side, it would have caused injury on the right side of the neck like injury No. 9 on the left side. This apart, it is not disputed that all the other injuries on the deceased could have been caused by a single shot from a double-barrelled gun. Both the trial court as well as the High Court has held that the medical evidence is consistent with the ocular evidence. We did not see any reason to interfere with the findings recorded by both the Courts.

This Court in *Laxman v. State of Maharashtra, AIR 2002 SC 2973,* has enumerated the circumstances in which the dying declaration can be accepted. We may notice here the observations made in the Paragraph 3, which are as under :-

> The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood

is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of

mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

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***230. EVIDENCE ACT, 1872 – Section 32 (1)**
CRIMINAL PROCEDURE CODE, 1973 – Sections 161 and 162
Statement recorded under Section 161 CrPC if satisfy the conditions of Section 32 (1) of the Evidence Act, would be treated as dying declaration after the death of the maker – Sections 161 and 162 CrPC admittedly provide for a restrictive use of the statements recorded during the course of the investigation but sub-section (2) of Section 162 deals with the situation where the maker of the statement dies and a bare perusal of this provision when read with Section 32 of the Evidence Act would reveal that the statement of a person recorded under Section 161 would be treated as a dying declaration after his death.

Mukeshbhai Gopalbhai Barot v. State of Gujarat
Judgment dated 04.08.2010 passed by the Supreme Court in Criminal Appeal No. 15 of 2010, reported in (2010) 12 SCC 224

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231. EVIDENCE ACT, 1872 – Section 45
Reliability of opinion of medical expert – Doctor who examines deceased and conducts postmortem is the only competent person to opine about nature of injuries and cause of death – The Court will discard its evidence only in a case where the opinion is inherently defective.

Sahebrao Mohan Berad v. State of Maharashtra
Judgment dated 18.03.2011 passed by the Supreme Court in Criminal Appeal No. 289 of 2005, reported in (2011) 4 SCC 249

Held:

PW 7 Dr. Sunanda had performed post-mortem over the dead body of Laxmibai on 26.06.1984 between 2 p.m. and 3 p.m.. Her assertion that she had experience of conducting the post-mortem examination has not been questioned by the appellant. She had found haemotoma on the neck and in her opinion the death was possible by pressing the rolling pin on the neck. The rolling pin recovered at the instance of the appellant was shown to her and she gave opinion that the death can be caused by pressing the same on the neck.

This doctor though had found frothy discharge in the larynx and trachea

and whitish discharge from the right nostril, still on consideration of the finding as regards the external and internal injuries came to the definite opinion that the death was due to strangulation. She had specifically denied the suggestion that the deceased met with an accidental death due to drowning. In the face of the same we find it difficult to hold that the deceased met with an accidental death.

True it is that few signs of drowning were found on the dead body in the post-mortem examination and the doctor though cognizant of the same came to the definite conclusion that the deceased died of strangulation. In our opinion, the doctor who examined the deceased and conducted the post-mortem is the only competent person to opine the nature of injuries and the cause of death. It is only in a case, where the opinion is inherently defective, the Court will discard its evidence.

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***232. EVIDENCE ACT, 1872 – Sections 65 and 66**
CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 31

(i) *The question of admissibility of documents and proof of its differences* – **Section 65 of the Evidence Act permits the parties to adduce secondary evidence subject to a large number of limitations provided for in the section – The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original – Mere admission of a document in evidence does not amount to its proof – In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the Court to allow a party to adduce secondary evidence – The Court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.**
Further, admissibility of a document is one thing and its probative value quite another – These two aspects cannot be combined – A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil – It is the duty of the Court to examine whether the documents produced in the Court or contents thereof have any probative value.

(ii) *First Appeal – Proper mode of disposal*
The provisions under Order 41 Rule 31 CPC provide guidelines for the Appellate court as to how the Court has to proceed and decide the case. It must be evident from the judgment of the appellate court that the court has properly appreciated the facts/ evidence, applied its mind and decided the case considering the material on record – It would amount to substantial compliance with the said provisions if the appellate court's judgment is based on the independent assessment of the

relevant evidence on all important aspects of the matter and the findings of the appellate court are well founded and quite convincing – It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points – Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court – Thus, the entire evidence must be considered and discussed in detail – Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. [Vide *Sukhpal Singh v. Kalyan Singh, AIR 1963 SC 146, Girijanandini Devi v. Bijendra Narain Chaudhary, AIR 1967 SC 1124, G. Amalorpavam v. R.C. Diocese of Madurai, (2006) 3 SCC 224, Shiv Kumar Sharma v. Santosh Kumari, (2007) 8 SCC 600* **and** *Gannmani Anasuya v. Parvatini Amarendra Chowdhary, AIR 2007 SC 2380*]

H. Siddiqui (dead) by LRs. v. A. Ramalingam

Judgment dated 04.03.2011 passed by the Supreme Court in Civil Appeal No. 6956 of 2004, reported in (2011) 4 SCC 240

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233. EVIDENCE ACT, 1872 – Section 114 Ill. (g)

Evidence – Party having the best evidence in his power and possession, is duty bound to produce it in the Court in order to resolve the controversy and that party should not place reliance on the abstract doctrine of onus of proof and it was not his duty to produce it.

Natthulal v. Smt. Shakuntalabai & anr.

Judgment dated 20.01.2011 passed by the High Court of M.P. in Writ Petition No. 9747 of 2010, reported in ILR (2011) M.P. 1182

Held:

If a party is having the best evidence in his power and possession he is duty bound to produce it in the court in order to resolve the controversy and that party should not place reliance on the abstract doctrine of onus of proof that it was not part of his duty to produce it. According to me respondent no.1 should have filed the copy of election petition served upon her alongwith the summons in the Court in order to resolve the dispute. In this context, I may profitably place reliance on *Hiralal and others v. Badkulal and others, AIR 1953 SC 225, Gopal Krishnaji Ketkar v. Mohamed Haji Latif and others, AIR 1968 SC 1413* and *Goswami Shri Mahalaxmi Vahuji v. Shah Ranchhodda Kali Das (Dead) and others, AIR 1970 SC 2025.*

Nearly about a century ago the Privy Council in *T.S. Murugesam Pillai v. M.D. Gnana Sambandha Pandara Sannadhi and others, AIR 1917 PC 6* has laid down the same preposition which has been later on followed by the Apex Court in different decisions. In all these decisions it has been further held that if a party is having best evidence in his power and possession and he fails to submit it in the Court an adverse inference should be drawn against that party.

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234. FAMILY AND PERSONAL LAWS:

SUCCESSION ACT, 1925 – Sections 57 to 191 (Part VI)

(i) Construction of Will – The Court must put itself as far as possible in the position of a person making a Will in order to collect the testator's intention – In ordinary circumstances, ordinary words must bear their ordinary construction and every disposition of the testator contained in the Will should be given effect to as far as possible consistent with the testator's desire.

(ii) Distinction between 'a repugnant provision' and 'a defeasance provision' of a Will explained.

Siddamurthy Jayarami Reddy (Dead) by L.Rs. v. Godi Jayarami Reddy and another

Judgment dated 01.04.2011 passed by the Supreme Court in Civil Appeal No. 2916 of 2005, reported in (2011) 5 SCC 65

Held:

It is well settled that the court must put itself as far as possible in the position of a person making a will in order to collect the testator's intention from his expressions; because upon that consideration must very much depend the effect to be given to the testator's intention, when ascertained. The will must be read and construed as a whole to gather the intention of the testator and the endeavour of the court must be to give effect to each and every disposition. In ordinary circumstances, ordinary words must bear their ordinary construction and every disposition of the testator contained in the will should be given effect to as far as possible consistent with the testator's desire.

The above are the principles consistently followed and, we think, ought to be guided in determining the appeal before us. What then was the intention of this testator? The only son of the testator had predeceased him. At the time of execution of the will, he had his wife, widowed sister, widowed daughter-in-law, daughter and minor granddaughter surviving; the only other male member was his son-in-law Rami Reddy. He intended to give all his properties to the granddaughter but he was aware that after her marriage, she would join her husband's family. The testator intended that his entire estate remained in the family and did not go out of that and having that in mind, he desired that his daughter adopted a son with the consent of her husband and his granddaughter married the adopted son of his daughter. He, therefore, stated, "I intend to give

all my belongings, movable and immovable properties to the said Lakshumamma and the adopted son of my daughter Pitchamma". He expressed in unequivocal terms, "after my demise, my granddaughter Lakshumamma who is the daughter of my son shall have absolute rights in my entire properties".

The testator gave two very particular directions in the will that until Lakshumamma attained the age of majority and attained power to manage the properties; (one) Rami Reddy shall act as an executor till then, and (two) the executor shall look after the female members in the family, namely, his wife Subbamma, widowed daughter-in-law, daughter Picthamma, widowed sister Chennamma and granddaughter Lakshumamma. Rami Reddy, thus, was obligated to carry out the wishes of the testator by managing his properties and looking after the minor granddaughter Lakshumamma till she attained majority and also look after other female members in the family.

The clause, however, upon which the appellants' are claiming the rights in the properties of Rami Reddy is the clause that reads ".... If my daughter did not take any boy in adoption and if the said boy will not accept to marry my granddaughter Lakshumamma, I intend to give by aforesaid properties, one-third share to my daughter Picthamma and her husband, who is also my son-in-law Rami Reddy together. The remaining two-third share is given to my granddaugher Lakshumamma".

Senior Counsel for the appellants is right in contending that the above clause in the will is not a repugnant condition that invalidates the will but is a defeasance provision.

In *Rameshwar Kuer v. Shiolal Upadhaya, AIR 1935 Pat 401,* Courtney-Terrel, C.J., speaking for the Bench, explained the distinction between a repugnant provision and a defeasance provision thus:

> "The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law seems to be that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore, void; but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law the original estate is curtailed and the gift over must be taken to be valid and operative."

The distinction between a repugnant provision and a defeasance provision explained in *Rameshwar Kuer* (supra) has been followed subsequently. In our view, the Patna High Court rightly explains the distinction between a repugnant provision and a defeasance provision.

The question, however, upon which the fate of this appeal depends is: whether Rami Reddy became entitled to any legacy by virtue of the defeasance clause under the will at all?

The testator was clear in his mind that after his death, his granddaughter should have absolute rights in his entire properties. He has said so in so many words in the will. However, he superadded a condition that, should his daughter Pitchamma and son-in-law Rami Reddy not adopt a son or if his daughter and son-in-law adopted a son but that boy did not agree to marry his granddaughter, then one-third share in his properties shall go over to his daughter Pitchamma and her husband Rami Reddy. The bequest to the extent of one-third in the properties of the testator in favour of Pitchamma and her husband Rami Reddy jointly was conditional on happening of an uncertain event noted above. As a matter of fact and in law, immediately after the death of the testator in 1920, what became vested in Rami Reddy was not legacy but power to manage the properties of the testator as an executor; the legacy vested in Lakshumamma, albeit, defeasibly to the extent of one-third share. The only event on which the legacy to Lakshumamma to the extent of one-third share was to be defeated was upon happening of any of the above events. Learned Senior Counsel, thus, is not right in contending that on the death of the testator in 1920, the legacy came to be vested in Rami Reddy and once vesting took place, it could not have been divested.

It has come in evidence that Pitchamma wanted to adopt Godi Venkat Reddy as her son, but her husband Rami Reddy did not agree to that and as a result thereof, Godi Venkat Reddy could not be adopted by Pitchamma. On the issue of adoption of Godi Venkat Reddy, a serious dispute ensued between Pitchamma and her husband. Rami Reddy left the family of the testator and Village Chennavaran somewhere in 1924 and went to nearby Village Pappireddypally where he married second time. It may be that there was no legal impediment for Rami Reddy to have a second wife before the Hindu Succession Act, 1956 or the Bigamy Prevention Act of 1949 when no child was begotten from Pitchamma, yet the fact of the matter is that he abandoned the family of the testator. There is no merit in the submission of learned Counsel for the appellant that abandonment was not voluntary and conscious.

Rami Reddy neither continued as a guardian of the minor granddaughter Lakshumamma nor looked after the testator's wife, widowed daughter-in-law, widowed sister and daughter. The female folk were left in the lurch with no male member to look after them. He took no care or interest in the affairs of the family or properties of the testator and thereby failed to discharge his duties as an executor.

In view of the predominant desire that his granddaughter should have his properties and that his properties did not go out of the family, the testator desired that his daughter adopted a son with the consent of her husband and his granddaughter married that boy. The conditional legacy to Rami Reddy (to the extent of one-third share jointly with Pitchamma) was not intended to be given to him if he happed to be instrumental in defeating the testator's wish in not

agreeing to the adoption of a son by his (testator's) daughter. Such an intention might not have been declared by the testator in express terms but a necessary inference to that effect can safely be drawn by reading the will as a whole.

In the circumstances the legacy to the extent of one-third share cannot be held to have ever vested in Rami Reddy jointly with Pitchamma as it was he who had defeated the adoption of son by the testator's daughter. As a matter of fact by his conduct, Rami Reddy rendered himself disentitled to any legacy.

Not only that Rami Reddy did not discharge is obligations under the will of looking after the family and managing the properties as an executor but he was also instrumental in frustrating the adoption of son by the testator's daughter. Much before the defeasance clause came into operation when Lakshumamma married Godi Venkat Reddy who could not be adopted as son by Pitchamma, Rami Reddy had already left the testator's family for good and abandoned the legacy that could have come to him under the clause.

All in all, on the construction of the will and in the circumstances, it must be held and we hold that no legacy came to be vested in Rami Reddy and he did not become entitled to any interest in the estate of the testator and, therefore, the plaintiffs did not acquire any right, title or interest in the properties of Bijivemula Subba Reddy.

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235. HINDU MARRIAGE ACT, 1955 – Section 13-B

Divorce by mutual consent – Withdrawal of consent by one of the parties – Time period therefor – Held, one of the parties may withdraw its consent at any time before passing of decree of divorce – The eighteen-months' period [as mentioned in Section 13-B(2)] is specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify time period for withdrawal of consent.

Hitesh Bhatnagar v. Deepa Bhatnagar

Judgment dated 18.04.2011 passed by the Supreme Court in Civil Appeal No. 6288 of 2008, reported in (2011) 5 SCC 234

Held:

Admittedly, the parties had filed a petition for divorce by mutual consent expressing their desire to dissolve their marriage due to temperamental incompatibility on 17-08-2001. However, before the stage of second motion, the respondent withdrew her consent by filing an application dated 22-3-2003. The withdrawal of consent was after a period of eighteen months of filing the petition. The respondent, appearing in person, submits that she was taken by surprise when she was asked by the appellant for divorce, and had given the initial consent under mental stress and duress. She state that the never wanted divorce and is even now willing to live with the appellant as his wife.

The appellant, appearing in person, submits that at the time of filing of the petition, a settlement was reached between the parties, wherein it was agreed that he would pay her 3.5 lakhs, of which he states he has already paid 1.5 lakhs in three instalments. He further states in his appeal, as well as before us, that he is willing to take care of the respondent's and their daughter's future interest, by making a substantial financial payment in order to amicably settle the matter. However, despite repeated efforts for a settlement, the respondent is not agreeable to a decree of divorce. She says that she wants to live with the appellant as his wife, especially for the future of their only child, Anamika.

The question whether consent once given can be withdrawn in a proceeding for divorce by mutual consent is no more res integra. This Court in *Sureshta Devi v. Om Prakash, (1991) 2 SCC 25* has concluded this issue and the view expressed in the said decision as of now holds the field.

The language employed in Section 13-B (2) of the Act is clear. The court is bound to pass a decree of divorce declaring the marriage of the parties before it to be dissolved with effect from the date of the decree, if the following conditions are met:

(a) A second motion of both the parties is made not before 6 months from the date of filing of the petition as required under sub-section (1) and not later than 18 months;

(b) After hearing the parties and making such inquiry as it thinks fit, the court is satisfied that the averments in the petition are true; and

(c) The petition is not withdrawn by either party at any time before passing the decree.

In other words, if the second motion is not made within the period of 18 months, then the court is not bound to pass a decree of divorce by mutual consent. Besides, from the language of the section, as well as the settled law, it is clear that one of the parties may withdraw their consent at any time before the passing of the decree. The most important requirement for a grant of a divorce by mutual consent is free consent of both the parties. In other words, unless there is a complete agreement between husband and wife for the dissolution of the marriage and unless the court is completely satisfied, it cannot grant a decree for divorce by mutual consent. Otherwise, in our view, the expression "divorce by mutual consent" would be otiose.

In the present fact scenario, the second motion was never made by both the parties as is a mandatory requirement of the law, and as has been already stated, no court can pass a decree of divorce in the absence of that. The non-withdrawal of consent before the expiry of the said eighteen months has no bearing. We are of the view that the eighteen-month period was specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify the time period for withdrawal of consent, as canvassed by the appellant.

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236. HINDU SUCCESSION ACT, 1956 – Sections 6, 8 and 9

Co-parcenary property – Male Hindu died – Sons, three daughters and widow remained – All are Class I heirs in Schedule appended to the 1956 Act – Three daughters have not been made parties in the suit – Determination of share of wife and son by Court – Improper – Decree set aside.

Man Singh (D) by LRs. v. Ram Kala (D) by LRs and others

Judgment dated 09.12.2010, passed by the Supreme Court in Civil Appeal No. 7179 of 2005, reported in AIR 2011 SC 1542

Held:

Widow, sons and daughters are Class I heirs and in terms of Section 9, the succession among heirs in Class I takes simultaneously and to the exclusion of all other heirs. Learned senior counsel for the appellant strenuously urged that in view of proviso to Section 6, which is attracted in the present case as the normal rule provided for by that Section does apply and the fact that Soran left behind him two wives, one son and three daughters at the time of his death and one of the surviving wives had also died, Shingari's share in the property would be at least 1/5th and, therefore, High Court was clearly in error in holding that Shingari alienated much beyond her share to the appellant. In this regard, learned senior counsel relied upon, (i) *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum and others, AIR 1978 SC 1239* and (ii) *Smt. Raj Rani v. Chief Settlement Commissioner, Delhi and others, AIR 1984 SC 1234.* We are afraid, in the absence of any pleading or evidence in the suit filed by the appellant that shares among heirs of Soran were determined by agreement or otherwise, the share of Shingari was not identified and, thus, she could not have alienated 1/5th share in the property to the appellant. In any case, determination of the shares in the absence of the three daughters of Soran, who were also Class I heirs in Schedule appended to the 1956 Act could not have been done. All the three courts fell in grave error in determining the shares of Shingari and the first respondent even though the three daughters were not party in the suit. The whole exercise by the three courts in this regard was unnecessary, uncalled for and in violation of principles of natural justice.

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237. INDIAN PENAL CODE, 1860 – Sections 120-B, 467, 471 and 420

PREVENTION OF CORRUPTION ACT, 1947 – Section 5 (2)

Criminal conspiracy – Accused/appellant entered into criminal conspiracy with co-accused, prepared false muster roll – In the same, names of casual labourers who were not engaged were inserted – In the light of evidence, there is no escape from the conclusion that it is accused/appellant who had verified and counter signed the muster roll and gave false certificate and on that basis wages were distributed to the labourers – Conviction not illegal – Sentence awarded not excessive.

Kuldeep Sharma v. State of H.P. & Anr.

Judgment dated 04.04.2011, passed by the Supreme Court in Criminal Appeal No. 1362 of 2003, reported in AIR 2011 SC 1895

Held:

Learned Senior Counsel appearing on behalf of the appellant submits that the occurrence had taken place as back in the year 1984 and the appellant had not only suffered ordeal of trial and appeal for long 27 years and in fact lost the job also and in such a situation, the ends of justice shall be met if the sentence of the appellant is reduced to the period already undergone. It is relevant to state that the High Court while dismissing the appeal has reduced the substantive sentence to one year each for the offence under Section 120-B, 467, 468, 471 and 420 of the IPC besides Section 5 (2) of the Prevention of Corruption Act. We are of the opinion that sentence awarded to the appellant in the facts and circumstances of the case cannot be said to be excessive, calling for interference in this appeal.

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***238. INDIAN PENAL CODE, 1860 – Section 149**

CRIMINAL TRIAL:

Factum of accused causing or not causing any injury and necessity of corroboration – The factum of causing an injury or not causing an injury would not always be relevant where the accused is sought to be roped in with the aid of Section 149 IPC – At the same time, where the animosity between the parties is admitted with a series of murders and attempted murders *inter se* and political rivalries going back for years together, a case of false implication is also a clear possibility – It is for this reason that the courts sift the evidence to separate the grain from the chaff and to see that in a case of admitted animosity and a large number of accused, some corroborating evidence to support the eyewitness account is looked for.

Deo Narain v. State of Uttar Pradesh

Judgment dated 28.07.2010 passed by the Supreme Court in Criminal Appeal No. 750 of 2005, reported in (2010) 12 SCC 298

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***239. INDIAN PENAL CODE, 1860 – Section 149**

Unlawful assembly – How to prove explained.

For imposition of liability under Section 149, it is not necessary that five or more persons must necessarily be brought before the Court and convicted – It may be that persons before the Court alongwith other names constituted an unlawful assembly and other persons so named may not be available for trial alongwith their companions for any reason, for instance that they have absconded – In such a case the fact that less than five persons are before the Court or

convicted before the Court does not make Section 149 IPC inapplicable.

[Note: *Mohan Singh v. State of Punjab, AIR 1963 SC 174* **(Constitution Bench) referred.]**

Shaji and others v. State of Kerala

Judgment dated 03.05.2011 passed by the Supreme Court in Criminal Appeal No. 1618 of 2005, reported in (2011) 5 SCC 423

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240. INDIAN PENAL CODE, 1860 – Section 149

Unlawful assembly – Vicarious liability under common object – Not only persons with active participation but the presence of the persons with an active mind in furtherance of their common object also makes them vicariously liable for the acts of unlawful assembly.

Amerika Rai and others v. State of Bihar

Judgment dated 23.02.2011 passed by the Supreme Court in Criminal Appeal No. 1516 of 2004, reported in (2011) 4 SCC 677

Held:

The law of vicarious liability under Section 149 IPC is crystal clear that even the presence in the unlawful assembly, but with an active mind, to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly. In that light, when the evidence is examined, it is obvious that Amerika Rai (A-1) who was elder in the family and father of Darbesh Rai (A-2), Mithilesh Rai (A-4) and Chulhan Rai (A-3), instead of acting in a responsible manner and preventing any unpleasant incident, exhorted the accused persons to bring the gun. The guns are normally not brought for making a show. The exhortation to bring the gun definitely speaks about the guilty mind of Amerika Rai (A-1), so also the use of guns by Mithilesh Rai (A-4), Sanjay Rai (A-5) and Sipahi Rai (A-6) is very clear that they also had guilty mind. Mithilesh Rai (A-4) went to the extent of injuring Dineshwar Rai (PW 7). Therefore, even their presence and part played by them was obviously pointing towards the common object of committing murder of Shankar Rai. Unfortunately, Shankar Rai became the victim of the circumstances. The accused persons had nothing to do with Shankar Rai. Their main ire was directed at Ram Babu (PW 6). But, perhaps because Shankar Rai took side of Ram Babu (PW6), he became the victim of circumstances and had to pay with his own life. Therefore, at least insofar as these persons are concerned, their presence and their active participation would make them guilty under Section 149 IPC, though the author of the injury to Shankar Rai was Chulhan Rai (A-3) whose appeal has already been dismissed.

However, that cannot be said about Darbesh Rai (A-2). He had been given the role of standing at the door of his house with a lathi. We feel that the evidence of the eyewitnesses that he was instigating the other accused persons to fire, appears to be an exaggeration. He would not have kept on standing there holding

a lathi had he shared the intention and the common object of committing murder of Shankar Rai. In our opinion, the role of Darbesh Rai (A-2), as attributed to by the eyewitnesses, should not make him vicariously liable. We, therefore, grant benefit of doubt to Darbesh Rai (A-2) and acquit him.

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241. INDIAN PENAL CODE, 1860 – Sections 300, 304 and 149

When culpable homicide not amounts to murder and when does it amount to murder? Occurrence took place due to hottest arguments and altercations between parties – Fight was not pre-determined – Could be termed as a result of grave and sudden provocation – Vital injury has been caused by only accused No.1 on head – Accused not aware that injuries caused by them were sufficient in ordinary course of nature to cause death – There is no common intention between accused persons – Case comes under Exceptions 1 and 4 of Section 300.

Veeran & Ors. v. State of M.P.

Judgment dated 13.04.2011, passed by the Supreme Court in Criminal Appeal No. 923 of 2011, reported in AIR 2011 SC 1655

Held:

In the instant case, it can be inferred that :

(i) The fight between both the parties was not premeditated as the incident took place due to heated arguments and altercations between them and could be termed as a result of sudden and grave provocation.

(ii) There was no intention to cause death of deceased.

(iii) They had no common intention to cause death of the deceased as only Veeran had hit Daddu (Deceased) with Gandasa on head, without there being any premeditation amongst themselves.

(iv) They were not aware that the injuries caused by them were sufficient in ordinary course of nature to cause death.

Also, fine distinction between Section 299 and Section 300 of IPC has been eloquently and beautifully carved out by Hon'ble Dr. Justice Arijit Pasayat in a recent judgment, after considering all the previous judgments of this Court. We may quote profitably the following paras of the judgment reported in *AIR 2005 SC 1142* titled *Thangaiya v. State of T.N. :*

> "17. These observations of Vivian Bose, J. have become *locus classicus*. The test laid down by *Virsa Singh v. State of Panjab, AIR 1959 SC 465 : 1958 SCR 1495* for the applicability of clause "thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause "thirdly" of Section 300, IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing

death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death viz. that the injury found to be present was the injury that was intended to be inflicted.

18. Thus, according to the rule laid down in *Virsa Singh case* even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

19. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons - being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

20. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages".

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242. INDIAN PENAL CODE, 1860 – Section 302

(i) Murder trial based on circumstantial evidence – Motive – Significance of motive may be considered as a circumstance which is relevant for assessing the evidence and becomes an issue of importance in a case of circumstantial evidence – Thus, absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused – Position reiterated.

(ii) Extra-judicial confession – Reliability thereof – If voluntary and true and made in a fit state of mind can be relied upon – An independent witness, who was not biased nor inimical to accused and had no motive to falsely implicate the accused, made a crystal clear statement conveying that the accused had disclosed to him that they had committed the murder of the deceased – Extra-judicial confession proved.

(iii) Last seen theory, applicability of – The same comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible – Law reiterated.

(iv) Conviction based solely on circumstantial evidence, considerations of – Facts so established must be consistent with the hypothesis of the guilt of the accused and the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused – Further , a false defence may be called into to add only to lend assurance to the Court where various links in the chain of circumstantial evidence are in themselves complete.

Kulvinder Singh and another v. State of Haryana

Judgment dated 11.04.2011 passed by the Supreme Court in Criminal Appeal No. 916 of 2005, reported in (2011) 5 SCC 258

Held:

In *State of U.P. v. Kishanpal, (2008) 16 SCC 73,* this Court examined the issue of motive in a case of circumstantial evidence and observed that motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually prompted or excited them to commit the particular crime and thus, motive may be considered as a circumstance which is relevant for assessing the evidence and becomes an issue of importance in a case of circumstantial evidence. Thus, absence of motive in a case depending on circumstantial evidence is a factor that weighs in favor of the accused. (See also *Pannayar v. State of T.N., (2009) 9 SCC 152, Babu v. State of Kerala, (2010) 9 SCC 189 and Bipin Kumar Mondal v. State of W.B., AIR 2010 SC 3638*)

Phool Singh (PW 10) faced the grueling cross-examination but the defence could not elucidate anything to discredit him and the courts below have found that the deposition of Phool Singh (PW 10) in respect of the extra-judicial confession made to him by the accused remained a trustworthy piece of evidence as rightly been relied upon. Phool Singh (PW 10) in his statement recorded under Section 161 CrPC has stated that the appellants had told him on 13-10-1997 that due to the fear of police they were running from pillar to post.

He had a good understanding with the police being the ex-Sarpanch and thus, he should heldp and produce them before the police.

In *State of Rajasthan v. Raja Ram, (2003) 8 SCC 180,* this Court held as under:

> "19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made, the value of the evidence as to the confession depends on the reliability of the witness who give the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak of such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

After going through the evidence of Pool Singh (PW 10), we reach the inescapable conclusion that Phool Singh (PW 10) is an independent witness and by no means could be held to be biased or inimical to the accused. There is nothing on record to indicate that he had any motive to falsely implicate the accused or that there was any motive for attributing an untruthful statement to the accused. He had made a crystal clear statement conveying that the accused had disclosed to him that they had committed the murder of Amardeep, the deceased. Thus, we do not find any reason not to accept his deposition in respect of the extra-judicial confession made by the appellants as his deposition stands the test of credibility.

Not a single witness has deposed that the appellant-accused were last seen with the deceased. However, the courts below have found that the prosecution case has been very close to the circumstances of the appellants

and the deceased being last seen together. Ishwar Singh (PW 2) has deposed that the tubewell of Singh Ram is on the passage connecting his fields with the abadi of the village, where he saw both the appellants at about 7.00 p.m. Immediately thereafter, his son, Amardeep started for the village between 7.30 and 7.45 p.m. Ranbir Singh (PW 3) who heard the cries from the place of occurrence and saw the appellants running towards the village and the deceased was found to have an empty stomach at the time of occurrence as per the post-mortem report had indicated that Amardeep had been murdered before the could take his evening meal.

The trial court has examined the statement of Ranbir Singh (PW 3) minutely and rejected the defence version that in such a circumstance it was unnatural on th epart of this witness not to go to the source of shrieks, giving explanation that after hearing the shrieks he stopped on his was to the village and immediately thereafter he was both the accused running fast and crossing him. On being stopped and asked by Ranbir Singh (PW 3), the appellants told him that they were running without any specific purpose. Immediately thereafter, he could not hear any cry. Therefore, he did not inspect the place from where the cries seen to be coming. Thus, the trial court reached the conclusion that though it was not a case where the accused had been last seen together with the deceased, however, in a case when the accused had the opportunity to commit the crime and they had the motive on their part to do so, such a circumstance can also be taken note of.

In *State of U.P. v. Satish, (2005) 3 SCC 114,* this Court held that:

> "22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accuse being the author of the crime becomes impossible."

Similar view has been reiterated in *Mohd. Azad v. State of W.B.,(2008) 15 SCC 449.*

It is a settled legal proposition that conviction of a person in an offence is generally based solely on evidence that is either oral or documentary, but in exceptional circumstances conviction may also be based solely on circumstantial evidence. The prosecution has to establish its case beyond reasonable doubt and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are in themselves complete.

The circumstances from which the conclusion of guilt is to be drawn should be fully established. The same should be of a conclusive nature and exclude all possible hypothesis except the one to be proved. Facts so established must be consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. [Vide : *Sharad*

Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622 and *Paramjeet Singh v. State of Uttarakhand, AIR 2011 SC 200*]

In a case like this where all circumstances stand proved against the appellants, their defence may be examined to test the circumstances stood proved against them. In the instant case, Kulvinder Singh, Appellant 1 is a resident of another district. He had not taken the plea of alibi, nor led any evidence to support the hypothesis that he was not present at the place of occurrence on the date of incident. His only plea has been that he had been falsely implicated without saying anything further.

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243. INDIAN PENAL CODE, 1860 – Sections 306 and 107

Abetment of suicide – Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing – Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained – Human sensitivity of each individual differs from the other – Different people behave differently in the same situation – Hypersensitive conduct of the deceased to ordinary petulance, discord and differences which happen in day to day life is not sufficient to proceed against the alleged accused person.

S.S. Cheena v. Vijay Kumar Mahajan and another

Judgment dated 12.08.2010 passed by the Supreme Court in Criminal Appeal No. 1503 of 2010, reported in (2010) 12 SCC 190

Held:

In order to properly comprehend the scope and ambit of Section 306 IPC, it is important to carefully examine the basic ingredients of Section 306 IPC. The said section is reproduced as under:

> *"306. Abetment of suicide.*— If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

The word "suicide" in itself is nowhere defined in the Penal Code, however its meaning and import is well known and requires no explanation. "Sui" means "self" and "cide" means "killing", thus implying an act of self-killing. In short, a person committing suicide must commit it by himself, irrespective of the means employed by him in achieving his object of killing himself.

"Abetment" has been defined under Section 107 of the Code. We deem it appropriate to reproduce Section 107, which reads as under:

> "107. *Abetment of a thing.*– A person abets the doing of a thing, who–

First.— Instigates any person to do that thing; or

Secondly.— Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.— Intentionally aids, by any act or illegal omission, the doing of that thing."

Explanation 2 which has been inserted along with Section 107 reads as under:

> *"Explanation 2.*—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

In *Mahendra Singh v. State of M.P., 1995 Supp (3) SCC 731,* the allegations levelled were as under:

> "1. ... My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of these reasons and being harassed I want to die by burning."

The Court on the aforementioned allegations came to a definite conclusion that by no stretch the ingredients of abetment are attracted on the statement of the deceased. According to the appellant, the conviction of the appellant under Section 306 IPC merely on the basis of the aforementioned allegation of harassment of the deceased is unsustainable in law.

In *Ramesh Kumar v. State of Chhattisgarh, (2001) 9 SCC 618,* a three-Judge Bench of this Court had an occasion to deal with a case of a similar nature. In a dispute between the husband and wife, the appellant husband uttered "you are free to do whatever you wish and go wherever you like". Thereafter, the wife of the appellant, Ramesh Kumar committed suicide. The Court in para 20 has examined different shades of the meaning of "instigation". Para 20 reads as under:

> "*20.* Instigation is to goad, urge forward, provoke, incite or encourage to do 'an act'. To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The present one is not a case where the accused had by his acts or omission or by a continued course of conduct

> created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation."

In this case, the Court came to the conclusion that there is no evidence and material available on record wherefrom an inference of the appellant-accused having abetted commission of suicide by Seema may necessarily be drawn.

In *State of W.B. v. Orilal Jaiswal, (1994) 1 SCC 73,* this Court has cautioned that:

> "*17.* ... The court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it [appears] to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty."

This Court in *Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi), (2009) 16 SCC 605* had an occasion to deal with this aspect of abetment. The Court dealt with the dictionary meaning of the words "instigation" and "goading". The Court opined that there should be intention to provoke, incite or encourage the doing of an act by the latter. Each person's suicidability pattern is different from the other. Each person has his own idea of self-esteem and self-respect. Therefore, it is impossible to lay down any straitjacket formula in dealing with such cases. Each case has to be decided on the basis of its own facts and circumstances.

Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide.

Human sensitivity of each individual differs from the other. Different people behave differently in the same situation. In the instant case, the deceased was undoubtedly hypersensitive to ordinary petulance, discord and differences which happen in our day-to-day life. Hence order of framing a charge under Section 306 IPC against the appellant quashed and all proceedings pending against him are also set aside.

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***244. INDIAN PENAL CODE, 1860 – Section 307**
CRIMINAL PRCEDURE CODE, 1973 – Section 320 (9)
Offence under Section 307 IPC is not compoundable – But occurrence almost 20 years old – Accused are agriculturists – They have no previous criminal record – Reconciliation has taken place between the parties – Accused have already undergone sentence of more than 2½ years – To secure ends of justice, jail sentence is reduced to period already undergone while maintaining amount of fine in above circumstances.
Note: If offence is not compoundable and compromise has taken place – Effect of. [Please see *Ram Pujari and others v. State of U.P., AIR 1973 SC 2418 (3-Judge Bench), Ramlal v. State of Jammu & Kashmir, AIR 1999 SC 895* **and** *Hari Mohan v. State of Assam, AIR 2008 SC 388*].

Rajendra Harakchand Bhandari & Ors. v. State of Maharashtra & Anr.

Judgment dated 08.04.2011, passed by the Supreme Court in Criminal Appeal No. 902 of 2011, reported in AIR 2011 SC 1821

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245. INTELLECTUAL PROPERTY:

(i) Passing of in trademark – Injunction – No one can be permitted to encroach upon the reputation and goodwill of other parties – Even assuming that the trademark or name has a generic word yet if it is found by the Court that such a mark has attained distinctiveness and is associated with the business of the plaintiff for the considerable time and thereafter the defendant adopts a similar word as one of his two marks to induce innocent users to use or buy the product of the defendant, which establishes dishonest intention and bad faith, the Court would grant an injunction to protect the business of the plaintiff – User of similar word by a competitor coupled with dishonest intention and bad faith would empower a Court to restrain such user/ misuser to do equitable justice to the aggrieved party.

(ii) The test of common field of activity now accepted is that of "common class of consumers" – The reason for this is the likelihood of such consumers identifying the defendant's goods as originating from the same source as the plaintiff – The

question therefore, would be, whether from the factual situation, an inference can be drawn that a purchaser of the defendant's product could assume such product as originating from the plaintiff.

(iii) In the present case, the respondent Company's mark "Eenadu" has acquired extraordinary reputation and goodwill in the State of Andhra Pradesh – "Eenadu" newspaper and TV are extremely well known and almost household words in the State of Andhra Pradesh – The word "Eenadu" may be a descriptive word but has acquired a secondary or subsidiary meaning and is fully identified with the products and services provided by the respondent Company.

T.V. Venugopal v. Ushodaya Enterprises Limited and another

Judgment dated 03.03.2011 passed by the Supreme Court in Civil Appeal No. 6314 of 2001, reported in (2011) 4 SCC 85

Held:

In *Halsbury's Laws of England,* Vol. 48, 4th Edn. at p. 190, it is stated that it is possible for a word or phrase, which is wholly descriptive of the goods or services concerned, to become so associated with the goods or services of a particular trader that its use by another trader is capable of amounting to a representation that his goods or services are those of the first trader and that although the primary meaning of the words is descriptive, they have acquired a secondary meaning as indicating the products of a particular trader.

In *McCarthy on Trademarks and Unfair Competition,* Vol. 2, 3rd Edn. in para 12.5(2) it is stated that in order to obtain some form of relief on a "passing off" claim, the user of a generic term must prove some false or confusing usage by the newcomer above and beyond mere use of generic name.

The contention of the defendant is that adjectives are normally descriptive words and nouns are generic word. However, McCarthy has said that the said "part of speech" test does not accurately describe the case law results, therefore, such a criteria cannot be accepted as a safe and sound basis to ascertain as to whether a particular name is generic or descriptive. Besides, even assuming that the said word is generic yet if it is found by the court that such a mark has attained distinctiveness and is associated with the business of the plaintiff for considerable time and thereafter the defendant adopts a similar word as one of his two marks to induce innocent internet users to come to the website of the defendant, which establishes dishonest intention and bad faith, would the court still be not granting injunction to protect the business of the plaintiff? The answer to the said question has to be an emphatic "No". User of similar word by a competitor coupled with dishonest intention and bad faith would empower a court to restrain such user/misuser to do equitable justice to the aggrieved party.

The protection qua common field of activity has now expanded and been interpreted to mean extending to other product lines than what is manufactured by the plaintiff and hence common field of activity is not restricted to same or similar products but extend to all other products. The test of common field of activity now accepted is that of "common class of consumers". The reason for this is the likelihood of such consumers identifying the defendant's goods as originating from the same source as the plaintiff. The question therefore would be, whether from the factual situation, an inference can be drawn that a purchaser of the defendant's product could assume such product as originating from the plaintiff.

In *Honda Motors Co. Ltd. v. Charanjit Singh, (2002) 101 DLT 359* (Del), wherein it has been observed that:

> "24. The case of the plaintiff is in fact based on passing-off action and not for infringement of the trade mark. It has never been the case of the plaintiff that the two sets of goods are identical. The concept of passing off, which is a form of tort has undergone changes with the course of time. The plaintiff now does not have to be in direct competition with the defendant to suffer injury from the use of its trade name by the defendants."

The Court further observed that:

> "42. In the present case the plaintiff's mark HONDA has acquired a global goodwill and reputation. Its reputation is for quality products. The name of HONDA is associated with the plaintiffs especially in the field of automobiles and power equipments on account of their superior quality and high standard. The plaintiff's business or products under the trade mark HONDA has acquired such goodwill and reputation that it has become distinctive of its products and the defendants' user of this mark for their product 'Pressure Cooker' tends to mislead the public to believe that the defendants business and goods are that of the plaintiff. Such user by the defendants has also diluted and debased the goodwill and reputation of the plaintiff.
>
> 43. As observed above, the concept of passing-off is a tort and with the passage of time, with the developing case law it has changed and now the two traders need not necessarily operate in the same field so as to suffer injury on account of the goods of one trader being passed-off as those of the other.
>
> 44. With the changed concept of passing-off action, it is now not material for a passing-off action that the plaintiff

and the defendant should trade in the same field. I find that some business are truly international in character and the reputation and goodwill attached to them cannot in fact be held being international also. The plaintiff's business is of international character and obviously the reputation and goodwill attached to its trade mark HONDA is also of international repute. The plaintiff's trade mark HONDA, which is of global repute, is used by the defendants for a product like pressure cooker, to acquire the benefit of its goodwill and reputation so as to create deception for the public who are likely to buy defendant's product believing the same as coming from the house of HONDA or associated with the plaintiff in some manner. By doing so, it would dilute the goodwill and reputation of the plaintiff and the wrong committed by the defendants would certainly be an actionable wrong and the plaintiff is within its rights to ask for restraint against the defendants from using its mark HONDA for their products."

From the above discussions, the following two situations arise:

(i) Where the name of the plaintiff is such as to give him exclusivity over the name, which would *ipso facto* extend to barring any other person from using the same *viz.* Benz, Mahindra, Caterpillar, Reliance, Sahara, Diesel, etc.

(ii) The plaintiff's adopted name would be protected if it has acquired a strong enough association with the plaintiff and the defendant has adopted such a name in common field of activity i.e. the purchaser's test as to whether in the facts of the case, the manner of sale, surrounding circumstances, etc. would lead to an inference that the source of the product is the plaintiff.

The respondent Company's mark "Eenadu" has acquired extraordinary reputation and goodwill in the State of Andhra Pradesh. "Eenadu" newspaper and TV are extremely well known and almost household words in the State of Andhra Pradesh. The word "Eenadu" may be a descriptive word but has acquired a secondary or subsidiary meaning and is fully identified with the products and services provided by the respondent Company.

The appellant is a Karnataka based company which has started manufacturing its product in Bangalore in the name of "Ashika" and started selling its product in the State of Andhra Pradesh in 1995. The appellant started using the name "Eenadu" for its agarbatti and used the same artistic script, font and method of writing the name which obviously cannot be a coincidence. The appellant Company after adoption of name "Eenadu" accounted for 90% of sale of their product agarbatti.

On consideration of the totality of the facts and circumstances of the case, we clearly arrive at the following findings and conclusions:

(a) The respondent Company's mark "Eenadu" has acquired extraordinary reputation and goodwill in the State of Andhra Pradesh. The respondent Company's products and services are correlated, identified and associated with the word "Eenadu" in the entire State of Andhra Pradesh. "Eenadu" literally means the products or services provided by the respondent Company in the State of Andhra Pradesh. In this background the appellant cannot be referred or termed as an honest concurrent user of the mark "Eenadu";

(b) The adoption of the word "Eenadu" is *ex facie* fraudulent and mala fide from the very inception. By adopting the mark "Eenadu" in the State of Andhra Pradesh, the appellant clearly wanted to ride on the reputation and goodwill of the respondent Company;

(c) Permitting the appellant to carry on his business would in fact be putting a seal of approval of the Court on the dishonest, illegal and clandestine conduct of the appellant;

(d) Permitting the appellant to sell his product with the mark "Eenadu" in the State of Andhra Pradesh would definitely create confusion in the minds of the consumers because the appellant is selling agarbattis marked "Eenadu" as to be designed or calculated to lead purchasers to believe that its product agarbattis are in fact the products of the respondent Company. In other words, the appellant wants to ride on the reputation and goodwill of the respondent Company. In such a situation, it is the bounden duty and obligation of the Court not only to protect the goodwill and reputation of the respondent Company but also to protect the interest of the consumers;

(e) Permitting the appellant to sell its product in the State of Andhra Pradesh would amount to encouraging the appellant to practise fraud on the consumers;

(f) Permitting the appellant to carry on his business in the name of "Eenadu" in the State of Andhra Pradesh would lead to eroding extraordinary reputation and goodwill acquired by the respondent Company over a passage of time;

(g) The appellant's deliberate misrepresentation has the potentiality of creating serious confusion and deception for the public at large and the consumers have to be saved from such fraudulent and deceitful conduct of the appellant;

(h) Permitting the appellant to sell his product with the mark "Eenadu" would be encroaching on the reputation and goodwill of the respondent Company and this would constitute invasion of proprietary rights vested in the respondent Company;

(i) Honesty and fair play ought to be the vases of the policies in the world of trade and busines

The law is consistent that no one can be permitted to encroach upon the reputation and goodwill of other parties. This approach is in consonance with protecting proprietary rights of the respondent company.

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246. LIMITATION ACT, 1963 – Article 65

Adverse possession – Unless the requisite ingredients of adverse possession, as per requirement of law are proved, merely on account of long possession of property under some misconception, the person could not have been declared to be the Bhumiswami of disputed land holding that he has perfected the title of the property by adverse possession.

Shalig Ram & ors. v. Anant Ram & ors.

Judgment dated 16.12.2010 passed by the High Court of M.P. in S.A. No. 470 of 1992, reported in ILR (2011) M.P. 1251

Held:

Mere on account of long possession of the respondent no. 1 over the disputed land, in the available circumstances, he could not be declared to be the Bhumiswami of the disputed land. Nowadays the law is well settled that unless the requisite ingredients of the adverse possession as per requirement of law are proved mere on account of long possession of the property under some misconception the person like respondent no.1 could not have been declared to be the Bhumiswami of disputed land holding that he has perfected the title of the property by adverse possession. Besides this in the lack of any positive evidence showing that on which date the respondent no.1 declared himself to be the owner and Bhumiswami of the disputed property in the knowledge of the appellant No. 1 and said Gaya Prasad and on which date by completing twelve years in uninterrupted possession of the property he has perfected his title over the property. In fact the same has not been proved by cogent, admissible and reliable evidence. In such premises, the approach of the appellate court holding the respondent no. 1 had perfected his title over the disputed land by adverse possession could not be held to be sustainable under the existing and trite law.

In the case of *Deva (dead) through L.Rs. v. Sajjan Kumar (dead) by L.Rs., (2003) 1 SCC 481* cited by the appellants' counsel the Apex Court has held as under:-

> 11. The deposition extracted above, in any case, negatives the defendant's case of having prescribed title by adverse possession from the year 1940. The animus to hold the land adversely to the title of the true owner can be said to have started only when the defendant derived knowledge that his possession over the suit land had been alleged to be an act of encroachment on plaintiffs survey number.
>
> 12. The above-quoted admission contained in the defendant's deposition, does not make out a case in his favour of having acquired title by adverse possession. Mere long possession

of defendant for a period of more than 12 years without intention to possess the suit land adversely to the title of the plaintiff and to latter's knowledge cannot result in acquisition of title by the defendant to the encroached suit land.

13. The plaintiff's suit is not merely based on his prior possession and subsequent dispossession but also on the basis of his title to Survey No. 452. The limitation for such a suit is governed by Article 65 of the Limitation Act of 1963. The plaintiff's title over the encroached land could not get extinguished unless the defendant had prescribed title by remaining in adverse possession for a continuous period of 12 years.

So in view of the principle laid down in the cited case, on examining the case at hand, the same appears to be applicable here and in such premises, it could not be deemed that the respondent no. 1 had perfected his title over the disputed land by adverse possession.

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247. MOTOR VEHICLES ACT, 1988 – Section 166

(i) Claim case – Proof – A witness who did not file a complaint of motor accident cannot be disbelieved on this ground.

(ii) In claim case, unlike criminal case, strict principle of proof not attracted.

(iii) Claim case – Proof of accident – Filing of complaint to the office of S.P. not disputed on the ground that nobody came forward to prove the same from the office of Police – Complaint cannot be disbelieved – Sensitized approach of plight of the victim in such case is a must.

Parmeshwari v. Amir Chand & Ors.

Judgment dated 28.01.2011, passed by the Supreme Court in Civil Appeal No. 1082 of 2011, reported in AIR 2011 SC 1504

Held:

Unfortunately, this Court finds that the said well considered decision of the Tribunal was set aside by the High Court, inter alia, on the ground that even though complaint was forwarded to SSP Hisar and was further forwarded to SSP Hanumangarh but none from the office of SSP, Hanumangarh came to prove the complaint. The filing of the complaint by the appellant is not disputed as it appears from the evidence of PW.3- Satbir Singh, who is the Assistant Complaint Clerk in the office of Superintendent of Police, Hisar. If the filing of the complaint is not disputed, the decision of the Tribunal cannot be reversed on the ground that nobody came from the office of SSP to prove the complaint.

The official procedure in matters of proceeding with the complaint is not within the control of the appellant, who is an ordinary village woman. She is not coming from the upper echelon of society. The general apathy of the administration in dealing with complaints lodged by ordinary citizens is far too well known to be overlooked by High Court. In this regard the perception of the High Court in disbelieving the complaint betrays a lack of sensitized approach to the plight of a victim in a motor accident claim case.

The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of Umed Singh PW.1. Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but as a good citizen, Umed Singh extended his help to the appellant by helping her to reach the Doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint him self.

We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitized enough to appreciate the plight of the victim. The other so-called reason in the High Court's order was that as the claim petition was filed after four months of the accident, the same is "a device to grab money from the insurance company". This finding in the absence of any material is certainly perverse. The High Court appears to be not cognizant of the principle that in a road accident claim, the strict principles of proof in a criminal case are not attracted. The following observations of this Court in *Bimla Devi and others v. Himachal Road Transport Corporation and others, AIR 2009 SC 2819.* are very pertinent.

> "In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied."

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248. MOTOR VEHICLES ACT, 1988 – Section 166

In injury claims, while determining compensation on the basis of reduction of earning capacity, impact on long life expectancy is also to be considered – Long expectation of life is connected with earning capacity – If earning capacity is reduced, that impacts life expectancy as well.

B.T. Krishnappa v. Divisional Manager, United Insurance Company Limited and another

Judgment dated 30.04.2010 passed by the Supreme Court in Civil Appeal No. 4027 of 2010, reported in (2010) 12 SCC 246

Held:

In *Concord of India Insurance Co. Ltd. v. Nirmala Devi, (1979) 4 SCC 365,* the Apex Court observed that:

> "2. ... The jurisprudence of compensation for motor accidents must develop in the direction of no-fault liability and the determination of the quantum must be liberal, not niggardly since the law values life and limb in a free country in generous scales."

In *Karnataka SRTC v. Mahadeva Shetty, (2003) 7 SCC 197,* where the claimant was also a mason, this Court held that:

> "15. ... It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. Bodily injury is nothing but a deprivation which entitles the claimant to damages. The quantum of damages fixed should be in accordance with the injury. An injury may bring about many consequences like loss of earning capacity, loss of mental pleasure and many such consequential losses. A person becomes entitled to damages for mental and physical loss, his or her life may have been shortened or that he or she cannot enjoy life, which has been curtailed because of physical handicap. The normal expectation of life is impaired."

Long expectation of life is connected with earning capacity. If earning capacity is reduced, that impacts life expectancy as well. Therefore, while fixing compensation in cases of injury affecting earning capacity the Court must remember:

> "10. ... No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury 'so far as money can compensate' because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame."

[See *R.D. Hattangadi v. Pest Control (India) (P) Ltd., (1995) 1 SCC 551*]

Further, the Court in the same case also held that:

"12. In its very nature whenever a tribunal or a court is required to fix the amount of compensation in cases of accident, it involves some guesswork, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards."

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249. MOTOR VEHICLES ACT, 1988 – Section 168

Compensation – Future loss assessment – Claimant working as a silk winder – He sustained serious head injury in accident leading to weakness of his right hand and leg – Weakening of his right hand would adversely affect his ability to perform his work as a silk winder and any other manual work – This is also certified by the doctor – High Court assessed the disability of claimant to earn in future at 25% - But Supreme Court assessed at 30% – Compensation enhanced accordingly.

C. Mohanraju v. Divisional Manager, United India Assurance Co. Ltd. & Anr.

Judgment dated 04.04.2011, passed by the Supreme Court in Civil Appeal No. 2931 of 2011, reported in AIR 2011 SC 1897

Held:

As per the doctor's evidence, doctor assessed disability as hemiparesis right side at 40%, severe headache 10%, blurring of vision 10% and recent loss of memory at 10%. He assessed 25-30% disability of the whole body. The doctor also added that as a result of the disability, the appellant was incapable of doing silk winding work or any other manual work. It seems that there is severe weakness of the right hand and leg. The appellant is a silk winder, an occupation for which he needs to use his hands. Weakening of his right hand would adversely affect his ability to perform his occupation as he had been doing before the accident. As a result, we assess the disability of the victim to earn in future at 30% as against 25% assessed by the High Court.

Thus, loss of future income amounts to ₹ 2,01,600 (30% of ₹ 6,72,000). We also enhance the compensation awarded for future medical expenses to ₹ 10,000. The compensation awarded by the High Court under the remaining heads is sustained. Thus, it comes to ₹ 3,17,100, which we round off to ₹ 3,20,000. Interest will be payable on the enhanced amount at 6% from the date of the claim petition till date of realization.

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250. MOTOR VEHICLES ACT, 1988 – Section 168

Compensation – How to assess loss of future income – Disability assessed by doctor of upper limb (68%) ought to be considered and not disability assessed of whole body (22-23%) – Because claimant was working as a coolie – Suffering permanent gross deformity of his left forearm, wrist and hand and shortening of left upper limb by 1 cm – Deformity grossly affecting his ability to perform his work as a coolie or do any other manual work and this has also been certified by doctor.

Nagarajappa v. Divisional Manager, Oriental Insurance Co. Ltd. Judgment dated 11.04.2011, passed by the Supreme Court in Civil Appeal No. 3203 of 2011, reported in AIR 2011 SC 1785

Held:

On perusal of the doctor's evidence with respect to the nature of injuries suffered by the appellant, the appellant was found, inter alia, to be suffering from the following disabilities as a result of the accident – "gross deformity of the left forearm, wrist and hand, wasting and weakness of the muscles of the left upper limb and shortening of the left upper limb by 1 c.m." As a result, the doctor stated that the appellant could not work as a coolie and could not also do any other manual work. The doctor assessed permanent residual physical disability of the upper limb at 68% and 22-23% of the whole body.

The appellant is working as a manual labourer, for which he requires the use of both his hands. The fact that the accident has left him with one useless hand will severely affect his ability to perform his work as a coolie or any other manual work, and this has also been certified by the doctor. Thus, while awarding compensation it has to be kept in mind that the appellant is to do manual work for the rest of his life without full use of his left hand, and this is bound to affect the quality of his work and also his ability to find work considering his disability. Hence, while computing loss of future income, disability should be taken to be 68% and not 20% as was done by the Tribunal and the High Court. Our view is supported from the ratio in *Raj Kumar v. Ajay Kumar & Anr., (2011) 1 SCC 343* and from the fact that the appellant is severely hampered and perhaps forever handicapped from performing his occupation as a coolie.

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251. N.D.P.S. ACT, 1985 – Sections 2 (xv) (a) (b), 8, 18 (b) and Schedule Entries 77, 92 and 93

CONSTITUTION OF INDIA – Article 20 (1)

(i) Notification dated 18.11.2009 of Ministry of Finance regarding amendment in the NDPS Act, 1985 published in the Gazette of India (Extraordinary) Part II, Section 3 (ii) in fact provides for a procedure which may enhance the sentence, cannot be applied retrospectively.

(ii) Where entire contraband material recovered has been considered as opium as defined in Clause (a) of Section 2 (xv), then the percentage of morphine contents, though given in the FSL Report, would be totally irrelevant – It is only if the offending substance is found in the form of mixture as specified in Clause (b) Section 2 (xv), then the quantity of morphine contents becomes relevant.

Harjit Singh v. State of Punjab

Judgment dated 30.03.2011 passed by the Supreme Court in Criminal Appeal No. 816 of 2011, reported in (2011) 4 SCC 441

Held:

Notification dated 18.11.2009 has replaced the part of the Notification dated 19.10.2001 [issued by the Central Government in exercise of power conferred by Clause (via) and (xxiiia) of Section 2 of the NDPS Act, 1985] and reads as under:

> "In the Table at the end after Note 3, the following Note shall be inserted, namely:
>
> (4) The quantities shown in Column 5 and Column 6 of the Table relating to the respective drugs shown in Column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

Thus, it is evident that under the aforesaid notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment. However, the submission is not acceptable as it is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18.11.2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned.

Opium is essentially derived from the opium poppy plant. The opium poppy gives out a juice which is opium. The secreted juice contains several alkaloid substances like morphine, codeine, thebaine, etc. Morphine is primary alkaloid in opium.

Opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and a very strong and characteristic scent.

However, chemical analysis of the contraband material is essential to prove a case against the accused under the NDPS Act.

In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity (7.10 Kgs.) and could not have been for personal consumption of the appellant. Thus the appellant being in possession of the contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 18(b) of the NDPS Act. The instant case squarely falls under clause (a) of Section 2(xv) of the NDPS Act and clause (b) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice. For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry 92 becomes totally redundant.

Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry 93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry 92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity.

The notification applicable herein specifies small and commercial quantities of various narcotic drugs and psychotropic substances for each contraband material. Entry 56 deals with heroin, Entry 77 deals with morphine, Entry 92 deals with opium, Entry 93 deals with opium derivatives and so on and so forth. Therefore, the notification also makes a distinction not only between opium and morphine but also between opium and opium derivatives. Undoubtedly, morphine is one of the derivatives of the opium. Thus, the requirement under the law is first to identify and classify the recovered substance and then to find out under what entry it is required to be dealt with. If it is opium as defined in clause (a) of Section 2(xv) then the percentage of morphine contents would be totally irrelevant. It is only if the offending substance is found in the form of a mixture as specified in clause (b) of Section 2(xv) of the NDPS Act, that the quantity of morphine contents becomes relevant.

The material so recovered from the appellant is opium in terms of Section 2(xv) of the NDPS Act. In such a fact situation, determination of the contents of morphine in the opium becomes totally irrelevant for the purpose of deciding whether the substance would be a small or commercial quantity. The entire substance has to be considered to be opium as the material recovered was not

a mixture and the case falls squarely under Entry 92. Undoubtedly, the FSL report provided for potency of the opium giving particulars of morphine contents. It goes without saying that opium would contain some morphine which should not be less than the prescribed quantity, however, the percentage of morphine is not a decisive factor for determination of the quantum of punishment, as the opium is to be dealt with under a distinct and separate entry from that of morphine.

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252. N.D.P.S. ACT, 1985 – Sections 8, 18, 35 and 54

Conscious possession of contraband articles (opium) by the motorcycle driver in respect of physical possession of his pillion rider, establishment of – Having seen the police, both tried to run around and flee away – Presumption of conscious possession rightly inferred.

Jagdish Rai v. State of Punjab

Judgment dated 11.03.2011 passed by the Supreme Court in Criminal Appeal No. 1450 of 2008, reported in (2011) 4 SCC 571

Held :

As observed by the High Court:

> "Two persons were concededly seen coming on a motorcycle. Having seen the police, efforts were made to retreat. The appellants, however were nabbed. Why would appellant Jagdish Rai, who was seen driving the motorcycle, would make an effort to retreat in case he was not aware of what was being carried by his pillion rider, appellant Ajaib Singh? Appellant Ajaib Singh was found carrying the bag on his shoulder. It is not the case of the appellants that they both were strangers or Ajaib Singh had taken lift from him. They both were travelling on a private motorcycle and it was not a public vehicle. It is difficult to assume that Jagdish Rai was not in conscious possession of the said contraband.....
>
> ....Once appellant Jagdish Rai was seen riding a motorcycle with a person on his pillion from whom this contraband was recovered, the prosecution, in my view, succeeded in showing that physical possession was that of appellant Ajaib Singh and appellant Jagdish Rai knew about it which is noticed from his action to retreat on seeing the police party and, thus, could be construed in possession of the contraband. He apparently was conscious of the fact that his pillion rider is carrying opium. It is to cover such situations, that provisions in the form of Sections 35 and 54 of the Act are made where presumptions are available

to be drawn from the possession of illicit articles as established. It would, as such, be difficult to say that the appellant Jagdish Rai was not found to be in conscious possession of the contraband. Once he was shown to be driving a motorcycle with the appellant carrying the bag, it was for him to show that he was not aware of what was being carried in the bag and the special provisions of Sections 35 and 54 of the Act would require him to do so."

The Apex Court fully agreed with the view taken by the High Court.

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253. N.D.P.S. ACT, 1985 – Sections 51, 52 and 52-A

(i) Seizure witnesses, significance of – The seizure witnesses turning hostile may not be very significant by itself, as it is not an uncommon phenomenon in criminal trials, particularly in cases relating to NDPS.

(ii) Production of seized contraband before the trial Court – Necessity thereof – To connect the FSL report with the substance that was seized from the possession of the appellant or the other accused, it is necessary for the prosecution to produce the seized substance marked as material objects before the Court during trial.

Ashok alias Dangra Jaiswal v. State of Madhya Pradesh

Judgment dated 05.04.2011 passed by the Supreme Court in Criminal Appeal No. 1438 of 2008, reported in (2011) 5 SCC 123

Held:

The seizure witnesses turning hostile may not be very significant, as it is not an uncommon phenomenon in criminal trials, particularly in cases relating to NDPS but there are some other circumstances which, when taken together, make it very unsafe to uphold the appellant's conviction.

Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

It may be noted here that in *Jitendra v. State of M.P., (2004) 10 SCC 562* on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In *Jitendra* (supra), the Court observed and held as under : (SCC pp. 564-65, paras 5-6)

"5. The evidence to prove that *charas* and *ganja* were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The *charas* and *ganja* alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the forensic science laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the *charas* and *ganja* were seized from the possession of the accused or that the samples sent to the forensic science laboratory were taken from the drugs seized from the possession of the accused. Although the High Court noticed the fact that the *charas* and *ganja* alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the chemical examiner in a properly sealed condition and those were found to be *charas* and *ganja*. The High Court observed, 'non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced'. The High Court relied on Section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of *charas* and *ganja* were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is

punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can-still be sustained, is far-fetched."

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254. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 4, 32 and 118 (A) Promissory note a negotiable instrument – Its execution admitted – But presumption of consideration has been rebutted by oral evidence of mediators and handwriting expert – Promissory note also tampered – Defendants cannot be held liable.

Tatipamula Naga Raju v. Pattem Padmavathi

Judgment dated 24.02.2011, passed by the Supreme Court in Civil Appeal No. 2057 of 2011, reported in AIR 2011 SC 1499

Held:

After careful consideration, we are of the view that the trial court had properly appreciated the evidence, especially the evidence of the hand-writing expert – DW – 4. Upon perusal of the discussion of evidence in the judgment, it is clear that in the opinion of the expert, figure '1' had been written subsequently before ₹ 25,000 in the Promissory note. The trial court rightly appreciated the evidence of the mediators, in whose presence the dues of the defendant had been settled and Nanaji, son of the plaintiff was paid ₹ 90,000 in full settlement of ₹ 1,25,000 borrowed by the defendant from Nanaji. The defendant had admitted the earlier transactions which he had with the son of the plaintiff. In our opinion, the evidence of the mediators and hand-writing expert was duly considered and appreciated by the trial court and the trial court had come to a right conclusion. There was absolutely no reason for the lower appellate court to arrive at a different conclusion than the one arrived at by the trial court. We are, therefore, of the opinion that the findings arrived at by the trial court are absolutely correct and no justifiable reasons have been given by the lower appellate court for arriving at a different conclusion.

In our opinion, simply because the defendant had fairly admitted his signature, the court should not have come to the conclusion that the amount was payable by the defendant especially when there was an expert's evidence that figure '1' was added so as to make the figure ₹ 1,25,000 from figure ₹ 25,000 and when the mediators had deposed to the effect that there were transactions between the defendant and the son of the plaintiff and in pursuance of the said transaction, Promissory note were executed by the defendant and one of the Promissory notes was not returned to the defendant. The explanation given by the defendant, which was supported by ample evidence, ought to have considered by the lower appellate court and the lower appellate court should not have been guided by a mere fact that the defendant had admitted execution of the Promissory note. In our opinion, in such a set of circumstances, the defendant ought not to have been saddled with a liability to pay the amount in pursuance of the tampered Promissory note for which no consideration had ever passed from the plaintiff to the defendant.

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***255. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 7, 138 and 142**

(i) *Maintainability of complaint when the payee is proprietary concern* **– Under Section 142, complaint is to be made in writing only by "payee" or as the case may be by the holder in due course of the cheque – Legal position emerged in** *Shankar Finance and Investments v. State of A.P., (2008) 8 SCC 536* **is that where the "payee" is a proprietary concern the complaint can be filed by:**

(a) the proprietor of the proprietary concern, describing himself as the sole proprietor of the 'payee';

(b) the proprietary concern, describing itself as the sole proprietary concern, represented by its sole proprietor; and

(c) the proprietor or the proprietary concern represented by the attorney-holder under the power of attorney executed by the sole proprietor.

Factual position in this case:

Complainant filed the complaint and claimed himself to be the sole proprietor of the "payee" sole proprietary firm namely Vijaya Automobiles, but did not produce any evidence to show that he was the proprietor of the firm Vijaya Automobiles.

Mere statement in the affidavit in this regard is not sufficient to meet the requirement of law. Unless the complainant establishes that the cheques had been issued to him or in his favour or that he is the sole proprietor of the concern and being so, he could also be the payee himself and thus, entitled to make the complaint, he has no *locus standi* **to file the complaint.**

Milind Shripad Chandurkar v. Kalim M. Khan and another
Judgment dated 03.03.2011 passed by the Supreme Court in Criminal Appeal No. 643 of 2011, reported in (2011) 4 SCC 275

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256. PARTNERSHIP ACT, 1932 – Sections 19, 20 and 22
SPECIFIC RELIEF ACT, 1963 – Section 20
Authority of partner as agent of firm to transfer immoveable property – In absence of any usage and custom of trade, such authority must be given expressly to transferring partner.
An act of a partner binds a firm, which is done to carry on, in the usual way, the business of the kind carried on by the firm.
Relief of specific performance, nature of – Such relief is discretionary and Court is not bound to grant the same merely because it is lawful to do so – Discretion of the Court must be sound and reasonable.

Sagarmal v. Shri Gujarati Beedi Co. and others
Judgment dated 07.03.2011 passed by the High Court of M.P. in First Appeal No. 479 of 2003, reported in 2011 (2) MPLJ 626 (DB)

Held:

In our considered opinion, a relief of specific performance in the attending facts and circumstances of the case cannot be granted, without examining the authority of defendants No. 2 and 3 to enter into the agreement of sale in respect of property belonging to the partnership firm. Admittedly, plaintiff has neither pleaded nor proved any specific written authority in favour of defendants No. 2 and 3 to deal with the property belonging to the partnership firm.

Power to transfer the firm's property must be expressly given to the transferring partner, so far as the immovable property of the partnership firm is concerned. We may successfully refer to the Apex Court decision in the case of *Bina Murlidhar Hemdev and others v. Kanhaiyalal Lokram Hemdev and others, AIR 1999 SC 2171,* wherein it is observed : –

> "Under Section 19(1) of the Partnership Act, the acts of a partner which are done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. Under Section 19(2), in the absence of any usage or custom of trade to the contrary, the above implied authority – (here express authority under clause 10 of the same nature) – does not *prima facie* empower the partner to "transfer immovable property belonging to the firm" as stated in clause (g) of Section 19(1) of the Partnership Act. Such a power to transfer property of the firm must be expressly

given to the transferring partner so far as immovable property is concerned there is no such authority shown."

Plaintiff has neither pleaded nor proved any usage and custom of trade to the contrary, which could have enabled it to seek decree for specific performance, in the absence of specific written authority.

Contention of learned senior advocate appearing on behalf of the appellant is that the relief of specific performance cannot be denied *de hors* Sections 20 and 21 of the Specific Relief Act, 1963. According to him, discretion vested in the trial Court has not been properly exercised and the decree for specific performance ought to have been granted. The learned senior advocate for respondents countered the aforesaid by submitting that in the attending facts and circumstances, the discretion has been rightly exercised in declining to grant the relief of specific performance.

Reliance has been placed by the learned senior advocate for the appellants on the Apex Court decision in the case of *S.V.R. Mudaliar (dead) by LRs. and others v. Mrs. Rajabu F. Buhari (dead) by LRs. and others, AIR 1995 SC 1607* to buttress his aforesaid contention. This case is quite distinguishable on facts inasmuch as it was found that there was an agreement between the vendor and vendee that vendee would re-convey the property sold to him if the vendor within three years repays the purchase money along with certain money as consortium. Such an agreement was found by the Apex Court as an enforceable contract. In the case in hand, the suit property admittedly belonged to the partnership firm. Plaintiff alleged that they entered into an oral agreement to purchase firm's property with defendants No. 2 and 3 alone (who were partners of the firm) whereas there were remaining 14-15 partners, who had not given authority to defendants No. 2 and 3 to enter into any such kind of agreement and are not proved to have ratified the alleged agreement of sale in respect of the property belonging to the partnership firm.

Sub-section (1) of Section 20 itself lays down that power to grant relief of specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. Obviously, discretion of the Court must be sound and reasonable.

Existence of agreement of sale may be independent of its enforceability. Every agreement need not be necessarily enforceable in the eye of law. This being so, apart from its proof, a plaintiff is obliged to establish that agreement set up by him is enforceable against the defendant within the ambit of provisions of the Specific Relief Act, 1963. Since the suit property was owned by the partnership firm, agreement to sell the same could have been validly entered into by all the partners or by any of the partners having authority from the remaining partners. Even subsequent ratification by remaining partners could have made the agreement enforceable in a Court of law. None of the situations is found proved, in the present

case. This being so, the oral agreement of sale set up by the plaintiff cannot be said to be binding on the partnership firm and the learned trial Judge is not found to have been exercised his jurisdiction contrary to law.

As a general rule, specific performance of the contract can only be obtained, if it can be found to be capable of mutual enforcement, i.e. at the time it was entered into, it could have been enforced by either party to it against the other.

A conjoint reading of Sections 19 and 22 of the Indian Partnership Act goes to show that an act of a partner binds a firm, which is done to carry on, in the usual way, the business of the kind carried on by the firm. Thus, the said two sections are not in conflict with each other. Instead, Section 22 may be construed as a procedural provision. An act of a partner performed in the usual way of business of the firm would bind the partnership firm. Thus, Section 22 being a procedural provision shows as to how a partner can bind his partnership firm and its partners, once his act falls within the four corners of Section 19(1) of the Act. Procedure provided in Section 22 may be taken help of, if the basic conditions prescribed under Section 19 are established, as per requirement of Section 19(1). In such a situation, an act of a partner would bind the partnership firm. If that basic requirement is not satisfied, even though a partner complies with the procedure provided in Section 22, by executing documents in the manner provided thereunder, it will not yield any fruitful result inasmuch as such an act will not bind partnership firm. We may profitably quote the following passage from the decision of High Court of Gujarat in the case of *Porbandar Commercial Co-operative Bank Limited v. M/s Bhanji Lavji and others, AIR 1985 Gujarat 106* : –

> "Section 22 of the Indian Partnership Act also cannot be of much assistance to Mr. Desai for the petitioner-Bank for the simple reason that it is merely a procedural provision which shows how a partner can bind his firm and the rest of the partners of the firm, once his act is within the four corners of Section 19(1). It is obvious that the procedure of Section 22 can be pressed in service provided the basic condition for foisting the liability on the firm and the remaining partners is established as per the requirement of Section 19(1). If that basic requirement is not satisfied, even though the partner complied with the procedure of Section 22 of the Act by executing instruments in the manner provided by Section 22, it would remain an abortive exercise."

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257. PREVENTION OF CORRUPTION ACT, 1988 – Section 19
Sanction of prosecution, validity of – Where the order of sanction is speaking one, the facts that investigating agency had forwarded draft sanction order to Sanctioning Authority, the Authority was not able

to recollect at the time of evidence on which date documents related to investigation were produced before him and how much time was taken in studying the documents and non-affording opportunity of hearing to the accused before granting sanction do not invalidate the sanction.

Union of India through Superintendent of Police CBI/ACB Bhopal v. Jayant Kumar Ganguli and another

Judgment dated 14.03.2011 passed by the High Court of M.P. in Cri. Revision No. 574 of 2002, reported in 2011 (3) MPHT 173 (DB)

Held:

A bare perusal of the impugned judgment would reveal that the sanction was held to be invalid due to non-application of mind on the part of Ravindra Sharma (P.W. 1) the Sanctioning Authority in view of the following admission made by him : –

"(i) The investigating agency had forwarded draft sanction order along with the other documents.

(ii) He was not able to recollect as to –

(a) on which date the documents relating to the investigation were produced before him.

(b) how many documents were perused by him.

(c) how much time was taken in studying the documents.

(iii) Before granting sanction, he had not afforded any opportunity of hearing to the respondents.

(iv) He was also not able to say with certainty as to whether the report (Exh. C-1) prepared by Chief Booking Supervisor supporting the defence was placed before him."

However, none of these facts was sufficient to invalidate the sanction on the aforesaid ground in the light of the well settled principles on the subject as explained by the Supreme Court in the under mentioned cases :-

(a) In *Indu Bhushan Chatterjee v. State of W.B., AIR 1958 SC 148,* the Sanctioning Authority, that clearly admitted that the sanction was prepared by the investigating agency, was not able to answer some questions in cross-examination. Nevertheless, the Court held that sanction itself was eloquently read with evidence of the Sanctioning Authority and was valid as the statement of the Sanctioning Authority did not prove that he merely put his signature on the ready-made sanction presented by the police without applying his mind to the facts of the case. Similar view was taken in *State of T.N. v. Damodaran, AIR 1992 SC 563,* wherein the Director

of Vigilance and Anti-Corruption had enclosed model sanction orders so as to enable the Revenue Divisional Officer to draft sanction order in those lines. Accordingly, it was held that sanction, based on all relevant materials placed before Sanctioning Authority, was perfectly valid.

(b) In *State of Maharashtra v. Ishwar Piraji Kalpatri, (1996) 1 SCC 542,* [which has been followed by the Apex Court in a recent decision rendered in *State of M.P. v. Harishankar Bhagwan Prasad Tripathi, (2010) 10 SCC 655],* it was held that while granting sanction of the officer concerned is not required to indicate that he had personally scrutinized the file and had arrived at the satisfaction for granting sanction. In this case only, it was pointed that Sanctioning Authority is not obliged to afford opportunity of hearing to the delinquent officer before according sanction.

Still, learned Senior Counsel, while making reference to the decision of the Apex Court in *State of T.N. v. M.M. Rajendran, (1998) 9 SCC 268,* has strenuously contended that the sanction was rightly held to be invalid as it was accorded on the basis of the report of investigating agency only. In that case, it was observed that even a detailed report forwarded by the Vigilance Department could not be held to be the complete record required to be considered for grant or refusal of the sanction. However, in the instant case, Ravindra Sharma clearly stated that the CBI had forwarded all the relevant documents to his office. The sanction order (Exh. P-1) contains reference to the fact that the record of investigation included statement of witness scribed by the Investigating Officer and statements of Neeraj Singh Thakur and Shivdasan Menon recorded by the Magistrate. Thus, the decision in *M.M. Rajendran's case* (supra), is distinguishable on facts as, in the present case, all the relevant facts necessary to satisfy the mind of the Sanctioning Authority were placed before it. In an identical situation, the Apex Court, in *C.S. Krishnamurthy v. State of Karnataka, (2005) 4 SCC 81,* has pointed out that the proof that all the particulars were placed before Sanctioning Authority for due application of mind would be required when the sanction order is not a speaking one.

Furthermore, as propounded in *State of Bihar v. P.P. Sharma, 1992 Supp (1) SCC 222* and re-affirmed in *Superintendent of Police (CBI) v. Deepak Chowdhary, AIR 1996 SC 186,* according of sanction is an executive act and validity thereof cannot be tested in the light of principles applicable to quasi-judicial orders.

This apart, as indicated already, the checking squad comprised of CBI as well as Railway Officials. Moreover, the case was based on recovery of excess amount for which the explanation tendered by the respondents was not found

to be reasonably plausible. Against this backdrop, the Sanctioning Authority, at the time of granting sanction, was obviously aware of all the facts constituting the offences as well as the probable defences.

Thus, viewed from any angle, the sanction (Exh. P-1) was perfectly valid and legal. Learned Trial Judge, therefore, has completely misdirected herself in releasing the respondents on the ground of invalidity thereof. In our considered opinion, it is a fit case requiring interference under the revisional jurisdiction. The fact that a considerable period of more than 12 years has already elapsed after the incident in question does not assume significance [See : *Krinshnamurthy's case* (supra)].

In the result, the revision stands allowed. The impugned judgment is hereby set aside and the matter is remanded to the Trial Court for decision on merits in accordance with law. Needless to say that nothing contained herein except concerning the point of sanction would influence the Trial Court's decision on merits.

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258. PROTECTION OF HUMAN RIGHTS ACT, 1993 – Sections 2(d) and 12 CIVIL SERVICES (CONDUCT) RULES, 1965 (M.P.) – Rules 3 and 3-A Findings of Human Rights Commission, effect of – Findings of Human Rights Commission have an overriding effect on the Departmental Enquiry because Protection of Human Rights Act is a Special Act. If Human Rights Commission finds any breach of human right by the Government Servant and directs the employer to take action, it will not be within the power of authorities to dilute the findings of the Commission in a domestic enquiry.

M.P. Human Rights Commission v. State of M.P. and others

Judgment dated 16.07.2010 passed by the High Court of M.P. in W.P. No. 28038 of 2003, reported in 2011 (3) MPHT 178

Held:

A conduct unbecoming of a Government servant is a misconduct and when proved, the delinquent is liable for punishment as per Disciplinary Rules. In the present case the rules are, M.P. Civil Services (Classification, Control and Appeal) Rules, 1966.

The Protection of Human Rights Act, 1993 has been enacted to provide for the Constitution of a National Human Rights Commission, State Human Rights Commission in State and Human Rights Court for better protection of human rights and for matter connected therewith or incidental thereto.

The Act of 1993 is a special enactment making provisions for better protection of human rights and for matters connected therewith or incidental thereto. It includes within its ambit the conduct of the Government servant amongst the public while discharging the official duties. In other words, if he is

found having violating the human rights even while discharging official duties he is liable for the consequences under the Act of 1993. This inference is drawn after combined reading of Rules 3, 3-A of the Rules of 1965 and the provisions contained under the Act of 1993. In other words Government servant cannot be absolved if found committing breach of human rights merely because he was discharging the official duties.

The question is as to whether the object with which the Act of 1993 has been brought into existence would be allowed to whittle down by construing that the Rules framed under Article 311 of the Constitution of India will have over-riding effect. As in the present case, despite there being a categorical finding by the Commission regarding violation of human rights by respondent Nos. 2 and 3, thus establishing their conduct being unbecoming of a Government servant under the Rules, 1965. The department exonerate them by holding a Departmental Enquiry, where as apparent they are exonerated of the charges.

In case of a special enactment the same will have an overriding effect on the provisions of other enactment in respect of the field covered by it over the general provisions. Combined reading of Rule 3 and Rule 3-A of the Rules of 1965 as well as Section 2(d) and 12(a) and (j) of the Act of 1993 would reveal that they are complementing rather than contradicting each other. There being no head on collusion in a field where both the Rules and said Sections would harmoniously operate when an inquiry is undertaken in respect of allegation of the breach of human rights against a Government servant during discharge of his official duties.

Thus, in a matter like the present one wherein a Government servant in discharge of his duties exceeds his powers and commits breach of human rights for which he is tried as per the procedure laid down under the Act of 1993. And on the basis of such enquiry the Commission returns a finding and directs the employer to take action, in the considered opinion of this Court, it will not be within the power of authorities to dilute the finding of the Commission in a domestic enquiry.

In view of above the action of respondent-State of M.P. in exonerating the respondent Nos. 2 and 3 cannot be given a stamp of approval.

The petition is allowed with a direction to respondent-State of M.P. to inflict punishment on respondent Nos. 2 and 3, on the basis of findings and the recommendations by the Commission, as also pay the compensation to victims along with interest @7.5% per annum from the date or order of commission till final payment.

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259. RENT CONTROL AND EVICTION:

KERALA BUILDINGS (LEASE AND RENT CONTROL) ACT, 1965 – Section 11 (4) (v) [Similar to Section 12 (1) (d) of the Accommodation Control Act, 1961 (M.P.)]

SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985 – Section 22

(i) Once the tenanted premises have been shown by evidence to be not in occupation of the tenant continuously for six months, the pleading of the landlord that such non-user is not without reasonable cause as the effect of putting the tenant on notice to plead and prove the availability of reasonable cause ceasing to occupy the tenanted premises.

(ii) Prohibition contained in Section 22 (1) of SICA does not cover proceedings instituted by landlord of a sick industrial company for eviction of company premises let out to it as per Rent Control and Eviction Act – Legal position reiterated.

Dunlop India Limited v. A.A. Rahna and another

Judgment dated 04.05.2011 passed by the Supreme Court in Civil Appeal No. 3911 of 2011, reported in (2011) 5 SCC 778

Held:

If the building is let out for residential purpose and the tenant is shown to be continuously absent from the building for six months, the court may presume that he has ceased to occupy the building or abandoned it. If the building is let out for business or commercial purpose, complete cessation of the business/ commercial activity may give rise to a presumption that the tenant has ceased to occupy the premises. In either case, legal possession of the building by the tenant will, by itself, be not sufficient for refusing an order of eviction unless the tenant proves that there was reasonable cause for his having ceased to occupy the building.

The initial burden to show that the tenant has ceased to occupy the building continuously for 6 months is always on the landlord. He has to adduce tangible evidence to prove the fact that as on the date of filing the petition, the tenant was not occupying the building continuously for 6 months. Once such evidence is adduced, the burden shifts on the tenant to prove that there was reasonable cause for his having ceased to occupy the tenanted premises for a continuous period of 6 months.

No straitjacket formula can be evolved for determining as to what is the reasonable cause and each case is required to be decided keeping in view the nature of the lease, the purpose for which the premises are let out and the evidence of the parties. If the building, as defined in Section 2 (1), is let out for industrial or commercial/business purpose and the same is not used for the

said purpose continuously for a period of six months, the tenant cannot plead financial crunch as ground to justify non-occupation of the building unless cogent evidence is produced by him to prove that he could not carry on the industrial or commercial/business activity due to fiscal reasons which were beyond his control. If the tenant does not use the building for the purpose for which it is let out, he cannot be said to be occupying the building merely because he has put some furniture or articles or machinery under his lock and key.

[See: *Achut Pandurang Kulkarni v. Sadashiv Ganesh Phulambrikar, AIR 1973 Bom 210]*

The question whether the prohibition contained in Section 22 (1) of the 1985 Act operates as a bar to the maintainability of a petition filed for eviction of the tenant was considered and answered in the negative in *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn, (1992) 3 SCC 1.*

In *Gujarat Steel Tube Co. Ltd. v. Virchandbhai B. Shah, (1999) 8 SCC 11* it was argued on behalf of the appellant that suit for recovery of rent, etc. is not maintainable in view of the prohibition contained in Section 22 (1). While affirming the judgment of he High Court, the Court referred to the earlier judgment in *Shree Chamundi Mopeds* (supra) and held: [*Virchandbhai case* (supra)]

> "9. Section 22 no doubt, inter alia, states that notwithstanding any other law no suit for recovery of money shall lie or be proceeded with except with the consent of the Board, but as we look at it the filing of an eviction petition on the ground of non-payment of rent cannot be regarded as filing of a suit for recovery of money. If a tenant does not pay the rent, then the protection which is given by the Rent Control Act against his eviction is taken away and with the non-payment of rent order of eviction may be passed. It may be possible that in view of the provisions of Section 22, the trial court may not be in a position to pass a decree for the payment of rent but when an application under Section 11 (4) is filed, the trial court in effect gives an opportunity to the tenant to pay the rent failing which the consequences provided for in the sub-section would follow. An application under Section 11 (4), or under any other similar provision, cannot, in our opinion, be regarded as being akin to a suit for recovery of money."

The same view was reiterated in *Carona Ltd. v. Parvathy Swaminathan & Sons, (2007) 8 SCC 559.*

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260. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3 (1) (x)
CRIMINAL PROCEDURE CODE, 1973 – Section 48
Offences of atrocities – Whether presence of victim is necessary? Held, Yes – The words used are "in any place within public view" occurring in Section 3 (1) (x) which means that the public must view the victim being insulted for which he must be present – If victim is not present, no offence of allegation in the above Section gets attracted.

Asmathunnisa v. State of A.P. represented by the Public Prosecutor, High Court of A.P., Hyderabad & another

Judgment dated 29.03.2011, passed by the Supreme Court in Criminal Appeal No. 766 of 2011, reported in AIR 2011 SC 1905

Held:

In this connection, learned counsel for the appellant has placed reliance on a judgment of the Kerala High Court in *E. Krishnan Nayanar v. Dr. M.A. Kuttappan & others, 1997 Cri LJ 2036.* The relevant paragraphs of this judgment are paras 12, 13 and 18. The said paragraphs read as under:

> "12. A reading of Section 3 shows that two kinds of insults against the member of Scheduled Castes or Scheduled Tribes are made punishable – one as defined under sub-section (ii) and the other as defined under sub-section (x) of the said section. A combined reading of the two sub-sections shows that under sub-section (ii) insult can be caused to a member of the Scheduled Castes or Scheduled Tribes by dumping excreta, waste matter, carcasses or any other obnoxious substance in his premises or neighborhood, and to cause such insult, the dumping of excreta etc. need not necessarily be done in the presence of the person insulted and whereas under sub-section (x) insult can be caused to the person insulted only if he is present in view of the expression "in any place within public view". The words "within public view", in my opinion, are referable only to the person insulted and not to the person who insulted him as the said expression is conspicuously absent in sub-section (ii) of Section 3 of Act 3/1989. By avoiding to use the expression "within public view" in sub-section (ii), the Legislature, I feel, has created two different kinds of offences an insult caused to a member of the Scheduled Castes or Scheduled Tribes, even in his

absence, by dumping excreta etc. in his premises or neighborhood and an insult by words caused to a member of the Scheduled Castes or Scheduled Tribes "within public view" which means at the time of the alleged insult the person insulted must be present as the expression "within public view" indicates or otherwise the Legislature would have avoided the use of the said expression which it avoided in sub-section (ii) or would have used the expression "in any public place".

13.Insult contemplated under sub-section (ii) is different from the insult contemplated under sub-section (x) as in the former a member of the Scheduled Castes or Scheduled Tribes gets insulted by the physical act and whereas in the latter he gets insulted in public view by the words uttered by the wrongdoer for which he must be present at the place.

xxx xxx xxx

18. As stated by the earlier the words used in sub-section (x) are not " in public place". But "within public view" which means the public must view the person being insulted for which he must be present and no offence on the allegations under the said section gets attracted. In my view, the entire allegations contained in the complaint even if taken to be true do not make out any offence against the petitioner."

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261. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Sections 3 (1) (x) and 3

(i) Whether use of words *"pallan", "pallapayal", "parayan"* **or** *"paraparayan"* **with intent to insult is an offence under the Act? Held, Yes.**

(ii) In tea shops and restaurants, two tumbler system prevalent – Separate tumblers for serving tea and other drinks to Scheduled Caste persons and non Scheduled Caste persons are used – It is an offence under the Act – These wrong doers must be criminally proceeded against and given harsh punishment if found guilty – All administrative and police officers will be accountable and departmentally proceeded against if despite having knowledge of those acts in the area under their jurisdiction they do not launch criminal proceedings against the culprits.

Arumugam Servai v. State of Tamil Nadu

Judgment dated 19.04.2011, passed by the Supreme Court in Criminal Appeal No. 958 of 2011, reported in AIR 2011 SC 1859

Held:

The word 'pallan' no doubt denotes a specific caste, but it is also a word used in a derogatory sense to insult someone (just as in North India the word 'chamar' denotes a specific caste, but it is also used in a derogatory sense to insult someone). Even calling a person a 'pallan', if used with intent to insult a member of the Scheduled Caste, is, in our opinion, an offence under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989 (hereinafter referred to as the 'SC/ST Act'). To call a person as a 'pallapayal' in Tamilnadu is even more insulting, and hence is even more an offence.

Similarly, in Tamilnadu there is a caste called 'parayan' but the word 'parayan' is also used in a derogatory sense. The word 'paraparayan' is even more derogatory.

In our opinion uses of the words 'pallan', 'pallapayal' 'parayan' or 'paraparayan' with intent to insult is highly objectionable and is also an offence under the SC/ST Act. It is just unacceptable in the modern age, just as the words 'Nigger' or 'Negro' are unacceptable for African Americans today (even if they were acceptable 50 years ago).

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262. SERVICE LAW:

(i) Disciplinary proceedings, commencement of – Held, the disciplinary proceedings commence only when chargesheet is issued to the delinquent employee

(ii) De novo enquiry – Meaning thereof – The entire proceedings including the chargesheet issued earlier stood quashed – In such a situation, it is not permissible to proceed on the basis of the chargesheet issued earlier – Thus, to initiate a fresh enquiry, a fresh chargesheet would be required.

Chairman-cum-Managing Director, Coal India Ltd. and others v. Ananta Saha and others

Judgment dated 06.04.2011 passed by the Supreme Court in Civil Appeal No. 2958 of 2011, reported in (2011) 5 SCC 142

Held:

In the instant case, proceedings were held ex-part against the delinquent as he failed to appear in spite of notice and such a course of the enquiry officer was justified [See *State of U.P. v. Saroj Kumar Sinha, AIR 2010 SC 3131*]. There is

no averment by the delinquent that he did not receive the said notice and the copy of the enquiry report. The plea taken by the delinquent shows that he has adopted a belligerent attitude and kept the litigation alive for more than two decades merely on technical grounds. The delinquent waited till the conclusion of the purported fresh enquiry initiated on 17.01.2002, even though he could have challenged the same having been initiated by a person not competent to initiate the proceedings and being in contravention of the orders passed by the High Court earlier. In such a fact situation, the High Court ought to have refused to entertain his writ petition. More so, the writ petition could not have been proceeded with and heard on merit when the statutory appeal was pending before the Board of Directors, CIL. [See *Transport* and *Dock Workers Union v. Mumbai Port Trust, (2011) 2 SCC 575.*]

Unfortunately, both the parties proceeded with the case without any sense of responsibility, as subsequent to disposal of the writ petition and appeal by the High Court, the statutory appeal filed by the delinquent after 15 months of imposition of punishment was entertained, though the limitation prescribed under the 1978 Rules is only 30 days and appeal has been dismissed on merit without dealing with the issue of limitation. It clearly shows that both sides considered the litigation as a luxury and that the appellants have been wasting public time and money without taking the matter seriously.

The statutory rules clearly stipulate that the enquiry could be initiated either by the CMD, CIL or by the CMD of the subsidiary company. In the first round of litigation, the learned Single Judge of the High Court vide judgment and order dated 22.02.2001 after quashing the orders impugned therein, had given liberty to the appellants to start the proceedings de novo giving adequate opportunity to the delinquent. The Division Bench vide judgment and order dated 08.08.2001 dismissed the appeal filed by the present appellants. Therefore, the question does arise as to what is the meaning of de novo enquiry.

There can be no quarrel with the settled legal proposition that the disciplinary proceedings commence only when a charge-sheet is issued to the delinquent employee. [Vide *Union of India v. K.V. Jankiraman, AIR 1990 SC 2010* and *UCO Bank v. Rajinder Lal Capoor, (2007) 6 SCC 694*].

The High Court had given liberty to the appellants to hold de novo enquiry, meaning thereby that the entire earlier proceedings including the charge-sheet issued earlier stood quashed. In such a fact situation, it was not permissible for the appellants to proceed on the basis of the charge-sheet issued earlier. In view thereof, the question of initiating a fresh enquiry without giving a fresh charge-sheet could not arise.

This Court has repeatedly held that an order of dismissal from service passed against a delinquent employee after holding him guilty of misconduct may be an administrative order, nevertheless proceedings held against such a

public servant under the statutory rules to determine whether he is guilty of the charges framed against him are in the nature of quasi-judicial proceedings. The authority has to give some reason, which may be very brief, for initiation of the enquiry and conclusion thereof. It has to pass a speaking order and cannot be an ipse dixit either of the enquiry officer or the authority. [Vide *Bachhittar Singh v. State of Punjab, AIR 1963 SC 395, Union of India v. H.C. Goel, AIR 1964 SC 364, Anil Kumar v. Presiding Officer, AIR 1985 SC 1121* and *Union of India v. Prakash Kumar Tandon, (2009) 2 SCC 541*]. Thus, the above referred order could not be sufficient to initiate any disciplinary proceedings.

It is a settled legal proposition that if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In such a fact situation, the legal maxim *sublato fundamento cadit opus* is applicable, meaning thereby, in case a foundation is removed, the superstructure falls.

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263. SERVICE LAW:

Purpose of probation in District Judiciary – Upright and honest Judicial Officers are needed in the District Judiciary which is the bedrock of our judicial system – If any judicial officer on probation is not found suitable by the Controlling/Appointing Authority after considering his overall performance, conduct and suitability for the job, he is liable for termination simplicitor – While taking a decision in this regard, neither any notice is required to be given to such Judicial Officer nor is he required to be given any opportunity of hearing.

Rajesh Kumar Srivastava v. State of Jharkhand and others

Judgment dated 10.03.2011 passed by the Supreme Court in Civil Appeal No. 2419 of 2011, reported in (2011) 4 SCC 447

Brief facts of the case :

In this case, appointment of Munsif (Civil Judge Class II/Junior Division) as probationer, after completing his training period, was ordered on 21.05.2002 and during this probation period, he was conferred with power of Judicial Magistrate First Class on 15.07.2009 but after considering his suitability as aforesaid, he was terminated by the Government of Jharkhand by order dated 31.07.2003 consequent upon the resolution of the Full Court of the concerned High Court. The legality of this order is under consideration in this case.

Held:

At the time when the impughed order was passed, the appellant was working as a probationer Munsif. A person is placed on probation so as to enable the employer to adjudge his suitability for continuation in the service and also for confirmation in service. There are various criteria for adjudging suitability of a person to hold the post on permanent basis and by way of confirmation. At

that stage and during the period of probation the action and activities of the probationer (appellant) are generally under scrutiny and on the basis of his overall performance a decision is generally taken as to whether his services should be continued and that he should be confirmed, or he should be released from service. In the present case, in the course of adjudging such suitability it was found by the respondents that the performance of the appellant was not satisfactory and therefore he was not suitable for the job.

The aforesaid decision to release him from service was taken by the respondents considering his overall performance, conduct and suitability for the job. While taking a decision in this regard neither is any notice required to be given to the appellant nor is he required to be given any opportunity of hearing. Strictly speaking, it is not a case of removal as sought to be made out by the appellant, but was a case of simple discharge from service. It is, therefore, only a termination *simpliciter* and not removal from service on the grounds of indiscipline or misconduct. While adjudging his performance, conduct and overall suitability, his performance record as also the report from the higher authorities were called for and they were looked into before any decision was taken as to whether the officer concerned should be continued in service or not.

In a recent decision of this Court in *Rajesh Kohli v. High Court of J&K, (2010) 12 SCC 783,* almost a similar issue cropped up for consideration, in which this Court has held that the High Court has a solemn duty to consider and appreciate the service of a judicial officer before confirming him in service and for this not only judicial performance but also probity as to how one has conducted himself is relevant and important. It was also held in the same decision that upright and honest judicial officers are needed in the District Judiciary which is the bedrock of our judicial system.

The order of termination passed in the present case is a fallout of his unsatisfactory service adjudged on the basis of his overall performance and the manner in which he conducted himself. Such decision cannot be said to be stigmatic or punitive. This is a case of termination of service *simpliciter* and not a case of stigmatic termination and, therefore, there is no infirmity in the impugned judgment and order passed by the High Court.

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***264. SUCCESSION ACT, 1925 – Section 372**

HINDU MARRIAGE ACT, 1955 – Sections 5, 11 and 16

Succession Certificate, grant of – 'M' married 'C' during the subsistence of his first marriage with 'S' and out of the wedlock with 'C' two daughters D-1 & D-2 were born – Held, marriage of 'M' with 'C' is in contravention of Section 5 of the Hindu Marriage Act, 1955 and therefore, is void but D-1 & D-2 are legitimate children of 'M' as per Section 11 of the Act – Hence 'S' being legally wedded wife of 'M' and

D-1 & D-2 being legitimate children of 'M' are entitled to obtain Succession Certificate for 1/3 share of service dues of 'M' – But 'C', not being legally wedded wife of 'M', would not be entitled to Succession Certificate.

Sarita Bai v. Chandra Bai and others

Judgment dated 26.04.2011 passed by the High Court of M.P. in Civil Revision No. 469 of 2006, reported in 2011 (2) MPLJ 609

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265. TRANSFER OF PROPERTY ACT, 1882 – Section 5
CIVIL PROCEDURE CODE, 1908 – Section 100
A family settlement – Is not a transfer of property – For sustained family settlement, evidence of antecedent title of the parties is not necessary.

Ganeshi (D) through LRs & Ors. v. Ashok & Anr.

Judgment dated 04.04.2011, passed by the Supreme Court in Civil Appeal No. 5514 of 2005, reported in AIR 2011 SC 1340

Held:

The trial court decreed the suit holding that the judgment and decree dated 27.10.1978 amounts to alienation and without consideration and legal necessity. It was held that the decree created new rights in defendant Nos. 2 to 5, and it cannot be said to be based on family settlement. Any alienation of immovable property of value of Rs. 100/- had to be registered and in the present case, the alienation is not by a registered document.

The defendants filed an appeal which was allowed by the first appellate court by the judgment of the District Judge, Faridabad dated 2.11.1983. The first appellate court held that plaintiff Nos. 1 and 2 (respondents in the first appeal) was given land in 1969 by way of gift by Ganeshi and because of this there was some unrest in the family, and hence the family settlement was made. The first appellate court relied upon the judgment of this Court in *Kale & Ors. v. Deputy Director of Consolidation, AIR 1976 SC 807* which held that in order to sustain a family settlement it is not necessary that there must be evidence of antecedent title of the parties.

A family settlement is not a transfer of property, as rightly held by the first appellate court. The first appellate court held that the family settlement was bona fide to avoid disputes in the family. The decree in Civil Suit No. 476 of 1978 was only in pursuance of that family settlement, and hence it could not be interfered with.

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*266. TRANSFER OF PROPERTY ACT, 1882 – Section 41
MUSLIM LAW:
LIMITATION ACT, 1963 – Section 65
Joint family – Presumption – No presumption of jointness of family available – In Mohammedan family, various members of family live in commensality, they do not form a joint family – Property purchased by one family member living jointly is not presumed to be joint family property unless it is shown that it was purchased from the joint fund of family.
Benami transaction –When the transaction is by registered document, the presumption is in respect of the genuineness of the document – Burden to prove that transaction is benami is on the person who raises such an objection.
Hiba – Oral hiba alleged to have been done in 1975 – No evidence that any action was taken for mutation of the names of beneficiaries or fact of execution of oral hiba was brought on record in any official document – On the contrary, the owner even after alleged oral hiba had sent communication to I.D.A. as owner of property – Plea of oral hiba rightly rejected.
Adverse possession – After the death of owner, his Legal Representatives had become owner of plot – Even if appellant continued in possession, then their possession was on behalf of all joint owners – No evidence of ouster of other joint owners – Plea of adverse possession not established.

Akbar Ali v. Asgar Ali
Judgment dated 03.12.2010 passed by the High Court of M.P. in F.A. No. 325 of 1999, reported in ILR (2011) MP SN 64 (DB)

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267. TRANSFER OF PROPERTY ACT, 1882 – Section 52
EVIDENCE ACT, 1872 – Section 44
Principle of *lis pendens*, applicability of –The principle does not apply to a *lis pendens* transferee, who has made purchase under his pre-existing rights.
Collusive decree – *Ex parte* judgment and decree obtained on the basis of forged document and by playing fraud on the Court – Such decree may be avoided by virtue of Section 44 of the Evidence Act.

Basant Kumar Gaur v. Suggamal and another
Judgment dated 17.02.2011 passed by the High Court of M.P. in F.A. No. 07 of 2002, reported in 2011 (2) MPLJ 342

Held:

Long back the Privy Council in the case of *Rajwant Prasad Pande and others v. Ram Ratan Gir and others, AIR 1915* Privy Council 99 has clearly held that the decree passed cannot be challenged except on the ground of fraud practised on Court.

It is true that a transfer made by a party to the suit is made subject to the outcome of such suit by virtue of the said provision. It may be void as per the said section on the ground of collusion. However, a distinction is liable to be made between the transfer which is made newly for the first time during the pendency of the suit and a transfer which is made by a party to the suit in favour of a person having pre-existing right.

Aforesaid distinction has been noticed by this Court long back in the case of *Munnilal v. Bhaiyalal, 1961 MPLJ 191.* It has been observed :-

> "20. The learned counsel for the appellants, however, urged that the legal implication of the decision of the Division Bench regarding applicability of the doctrine of lis pendens would be that the sale deed, dated 25.01.1954 cannot be the basis of any action in a Court of Law inasmuch as it being hit by the doctrine of lis pendens would be altogether void. In view of the wording of Section 52 of the Transfer of Property Act (which has been reproduced earlier), any transfer lis pendens would not be void or a nullity altogether; but would only be voidable and subject to the rights declared by the decree passed in the suit. Therefore, in each case it will have to be ascertained as to what rights are declared by the decree, which would be binding on the transferees pendente lite.
>
> 22. There can be no doubt that any transfer pendente lite would be subject to the rights declared by the decree and for that purpose, the transferee would be a representative-in-interest of the judgment-debtor. But this would hold good, so far as a simple transfer pendente lite is concerned. We have, therefore, exactly to ascertain the legal effect of the doctrine of lis pendens on the rights of a transferee pendente lite who takes a transfer in pursuance of an earlier contract of sale in his favour. And when the subsequent contractee has notice of the earlier contract and is unable to establish that he is a *bona fide* transferee in good faith for value without notice of the earlier contract, their Lordships of the Privy Council have laid down the general principle; and it may have to be applied to the facts of each

case to ascertain as to what the legal effect or the implication of the doctrine would be upon a particular set of facts. There can be no doubt that if the appellants had filed a suit for enforcing their rights as subsequent contractees to establish a case under Section 27(b) of the Specific Relief Act, in that event alone the respondent would become representative-in-interest of the vendor Ram Bharose. But unless that question under Section 27(b) of the Specific Relief Act is tried between the appellants and the respondents, the latter cannot be said to be the representative-in-interest of the vendor merely because they took a sale deed during the pendency of the appellants' suit wherein the respondents were not parties.

23. In *Azhar Hussain v. Mohammad Shibli and others, ILR 1939 Nagpur 548*, a Division Bench of this Court consisting of Grille J, and Niyogi J, held that for the purpose of Section 47 of the Civil Procedure Code the term 'Representative' would include representative-in-interest, such as the transferee of the decree-holder's, or the judgment-debtor's-interest, who so far as such interest is concerned, would not be bound by the decree. Any objection filed by such a transferee would be as a representative-in-interest of the judgment-debtor or the decree-holder and as such would be covered by Section 47 of the Civil Procedure Code. Such a transferee cannot be considered to be a stranger or a third person within the meaning of Order XX, Rule 58, Civil Procedure Code. It is true that as laid down by the learned Judges of the Division Bench, any transferee from either the judgment-debtor or the decree-holder during the pendency of the lis would certainly be a representative-in-interest, who would be bound by the decree. But, this case also lays down the general proposition. The exact situation which arises in the present case was not present in that case. The present one is a peculiar case where the question relating to doctrine of lis pendens has to be considered with reference to the rights of a prior as well as a subsequent contractee. Therefore, this case also is distinguishable. At this stage, I might observe that there can be no doubt about the dictum laid down by their Lordships of the Privy Council that a transferee pendente lite would be representative-in-interest of the transferor and would be bound by the rights or the obligations of transferor

declared by the decree. It is here that the difficulty arises as to what rights exactly are obtained under the decree.

24. A Division Bench of this Court consisting of Niyogi and Digby, JJ in *Gendmal and others v. Laxman and others, ILR 1944 Nagpur 852,* held that a purchaser pendente lite would be bound by the doctrine of lis pendens, as he would be a representative-in-interest of his vendor within the meaning of Section 47, Code of Civil Procedure; but the learned Judges have expressed the opinion that the mortgagee who pursued his remedy on a mortgage previously executed would not be affected by the doctrine of lis pendens arising from a suit subsequently instituted but instituted prior to the sale, unless he be impleaded in the suit. Of course, as has been laid down by the learned Judges of the Division Bench in the present case, a distinction would have to be made between the rights inchoate and vested rights. The case of superior mortgage would be one of a vested right while the case of an earlier contract of sale would be a case of inchoate right. Therefore, in the present case, the ultimate result will depend upon the trial of the question under Section 27(b) of the Specific Relief Act in order to ascertain as to what rights the appellants got in their decree for specific performance against the vendor, alone".

In the case in hand, it has also been found that the plaintiff had an agreement of sale in his favour dated 12.10.1979, whereas the defendant/ appellant had instituted the suit for specific performance on the basis of an agreement of sale dated 11.03.1980 (which has been held by the learned trial Judge as a forged document). The agreement in favour of the plaintiff is found to be within the knowledge of the defendant/appellant right from the beginning. Thus, the right of the plaintiff could not have been defeated by the decree for specific performance in favour of defendant/appellant, who was having inferior right.

I may successfully derive strength from the Full Bench decision of this Court in the case of *Ramdeo and another v. Gangubai and others, ILR 1951 Nagpur 831.* It has been observed that the rule embodied in Section 52 does not permit the parties to a litigation to deal with the property pending the litigation in a manner prejudicial of the right of the litigant. But a transfer made in answer to a claim founded on a right prior and superior to the one in litigation is outside the rule of lis pendens. The Full Bench has reproduced the following words of Robertson J. "Put broadly and briefly the doctrine of lis pendens forbids creation of new rights over property already the subject of suit pendente lite which are

calculated to injure the rights of the claimant. It does not, and if we consider for a moment we see that it could not, apply to the assertion of rights which existed prior to the institution of the pending suit."

Full Bench has finally concluded by observing that :-

> "There is nothing in the Code to prevent a pre-emptor having a prior right from securing the pre-emptional property with the consent of the transferee. That right cannot be said to be affected by the mere fact that another person claiming the right or pre-emption has instituted a suit for enforcement of his right. Sub-section (4) of Section 174 of the Code, was not intended to start a race between rival pre-emptors in filing suits."

In view of the aforesaid discussion, I am of the considered view that the Principle of lis pendens does not apply to a lis pendens transferee, who has made purchase under his pre-existing rights. This apart, it has already been found on the basis of the evidence on record that the alleged agreement dated 11.03.1980 set up by the defendant/appellant is a forged and concocted document and the appellant obtained a decree for specific performance, on the basis of such forged document, by playing fraud on the Court. In this view of the matter the exparte judgment and decree obtained by the defendant/appellant in C.S. No. 59-A/80 may well be avoided by the plaintiff/respondent No. 1 by virtue of Section 44 of the Indian Evidence Act.

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268. TRANSFER OF PROPERTY ACT, 1882 – Section 105
EASEMENTS ACT, 1882 – Section 52
Lease and licence – Distinctive features – Would inter alia depend upon other important factors like intention of the parties, substance of the document, whether document creates an interest in the property, nature of possession etc.

Pradeep Oil Corporation v. Municipal Corporation of Delhi and another

Judgment dated 06.04.2011 passed by the Supreme Court in Civil Appeal No. 6546 of 2003, reported in (2011) 5 SCC 270

Held:

It would be useful to examine at this stage the definition of "lease" and "licence" as envisaged under Section 105 of the Transfer of Property Act, 1882 and Section 52 of the Easements Act, 1882 respectively. Section 105 of the Transfer of Property Act, 1882 reads:

> "*105. Lease defined.* – A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

On the other had, Section 52 of the Easements Act, 1882 reads as :

> "52. *'Licence' defined.* – Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

A licence may be created on deal or parole and it would be revocable. However, when it is accompanied with a grant it becomes irrevocable. A mere licence does not create an interest in the property to which it relates. A licence may be personal or contractual. A licence without the grant creates a right in the licensor to enter into a land and enjoy it.

In *Halsbury's Laws of England,* 4th Edn., Vol. 27 at p. 21 it is stated:

> "*12. Licence coupled with grant of interest.* – A licence coupled with a grant of an interest in property is not revocable. Such a licence is capable of assignment, and covenants may be made to run with it. A right to enter on land and enjoy a profit a prendre or other incorporeal hereditament is a licence coupled with an interest, and is irrevocable. Formerly it was necessary that the grant of the interest should be valid; thus, if the interest was an incorporeal hereditament, such as a right to make and use a watercourse, the grant was not valid unless under seal, and the licence, unless so made, was therefore a mere licence and was revocable; but since 1873 the court has been bound to give effect to equitable doctrines and it will restrain the revocation of a licence coupled with a grant which should be, but is not, under seal."

A lease on the other hand, would amount to transfer of property.

In *Associated Hotels of India Ltd. v. R.N. Kapoor, AIR 1959 SC 1262,* the following well-established propositions were laid down by a Constitution Bench for ascertaining whether a transaction amounts to a lease or a licence:

"27. There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor. Whereas Section 52 of the Easements Act defines a licence thus;

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under the aforesaid section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not creat in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in *Errington v. Errington, (1952) 1 KB 290,* wherein Lord Denning reviewing the case law on the subject summarises the result of his discussion thus :

> 'The result of all these cases is that, although a person who is let into exclusive possession is prima facie to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy.'"

It is quite clear that the distinction between lease and licence is marked by the last clause of Section 52 of the Easements Act as by reason of a licence, no estate or interest in the property is created.

In *Qudrat Ullah v. Municipal Board, Bareilly, AIR 1974 SC 396* it was observed:

> "7. ... if an interest in immovable property, entitling the transferors (sic transferees) to enjoyment, is created, it is a leas; if permission to use land without right to exclusive possession is alone granted, a licence is the legal result."

A licence, inter alia, (a) is not assignable; (b) does not entitle the licensee to sue the stranger in his own name; (c) it is revocable and (d) it is determined when the grantor makes subsequent assignment. The rights and obligations of the lessor as contained in the Transfer of Property Act, 1882 are also subject to a contract to the contrary. Even the right of assignment of leasehold property may be curtailed by an agreement.

It is a well-settled legal position that a deed must be read in its entirety and reasonably. The intention of the parties must also as far as possible be gathered from the expressions used in the document itself.

In *Union Bank of India v. Chandrakant Gordhandas Shah, (1994)6 SCC 271,* an instrument was held to be a deed of lease as the lessee was conferred the right to exclusive possession wherefor various terms of the indenture which were taken into consideration for finding out whether the same was a lease or a licence.

Similarly, in *Vayallakath Muhammedkutty v. Illikkal Moosakutty, (1996) 9 SCC 382,* where the defendant was given exclusive possession of the disputed premises for running a hotel but was not given the permission to sub-lease the property, the document was held to be a licence:

> "9. ...this Court has indicated that for a consideration as to whether a document creates a licence or lease, the substance of the document must be preferred to the form. It is not correct to say that exclusive possession of a party is irrelevant, but at the same time it is also not conclusive. The other tests, namely, intention of the parties and whether the document creates any interest in the property or not, are important considerations."

In *Om Prakash v. Dr. Ravinder Kumar Sharma, 1995 Supp (4) SCC 115,* a deal was held to be a license where the keys of the premises were to be taken in the morning and returned in the evening and a portion thereof was occupied by the mother of the licensor.

In *Swarn Singh v. Madan Singh, 1995 Supp (1) SCC 306,* it held:

> "3. On a careful consideration of the above arguments, we feel that there is no substance in any one of them. To our mind it is very clear that the right granted under the above document is nothing but a licence. Our reasons are as under:

(1) the nomenclature of the document is licence. Of course, we hasten to add that nomenclature is not always conclusive;

(2) the document in question in no unambiguous terms says that the possession and control shall remain with the owner. This is a clear indication of the fact that no interest in immovable property has been conferred on the grantee. If it were to be a case of lease under Section 105 of the Transfer of Property Act, there must be an interest in the immovable property. On the contrary, if it were to be a licence under Section 52 of the Easements Act, no such interest in immovable property is created. The case on had is one of such.

4. No doubt there is a statement in the document that 'I shall not sub-left it to further anybody else'. This is nothing more than an affirmation of the requirement that the licensee must use the property. No doubt under Section 52 of the Easements Act, a licence is personal but where an affirmation is made that such an affirmation cannot alter the relationship of the parties as lessor and lessee. In this view factually the case *Capt. B. V. D.' Souza v. Antonia Fausto Fernandes, (1989) 3 SCC 574,* [quoted from the judgment and order date 3-5-1993 of the Andhra Pradesh Administrative Tribunal at Hyderabad in Oas Nos. 47322 of 1991 and 5668 of 1992] is distinguishable."

In *Lilawati H. Hiranandani v. Usha Tandon, AIR 1996 SC 441* an assignment made to the effect that the owner permitted the licensee to occupy a portion with no right or interest created in his favour and also undertaken to vacate the premises within one month, was held to be a case of licence.

In view of the aforesaid well-settled legal position, whether a particular document will constitute "lease" or "licence" would inter alia depend upon certain factors which can be summarized as follows:

(a) whether a document creates a licence or lease, the substance of the document must be preferred to the form;

(b) the real test is the intention of the parties – whether they intended to create a lease or a licence;

(c) If the document creates an interest in the property, it is a lease; but if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and

(d) if under the document a party get exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.

In the present case the grant has been made by the President of India in terms of Section 2 of the Government Grants Act, 1895 and the Transfer of Property Act, 1882 may have little bearing in the instant case. The former i.e. the Government Grants Act, 1895 being a special statute would prevail over the general statute i.e. the Transfer of Property Act, 1882. Accordingly, the rights and obligations of the parties would be governed by the terms of the provisions of the Government Grants Act, 1895 whereunder the Government is entitled to impose limitations and restrictions upon the grants and other transfers made by it or under its authority.

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269. WAKF ACT, 1995 – Sections 68 and 90

Whether notice under Section 90(1) of the Wakf Act mandatorily be given to the Wakf Board by a Magistrate before initiating proceedings under Section 68 of the Act? Held, No.

Jalil Khan v. Sadar Mutaballi

Judgment dated 12.01.2011 passed by the High Court of M.P. in Misc. Cri. Case No. 6773 of 2010, reported in 2011 (2) MPLJ 649

Held:

So far as the word "proceeding" is concerned, it does not mean only civil or criminal proceedings. The term "proceeding" has not been specified in Section 90 of the Act, but we have to consider the necessity of giving notice to a particular party in the sense of provisions of the Act.

On a bare reading of Sections 90 and 68, it is crystal clear that Section 90 of the Act relates only to civil proceeding in a suit or proceeding relating to a title or possession of wakf property and in that case, notice under Section 90(1) of the Act is mandatory. This section does not say that before initiating proceeding before a Magistrate under Section 68 of the Act, notice under Section 90(1) of the Act is to be given to the Board, nor does Section 68 of the Act reveals about such notice. So notice under Section 90(1) of the Act is not mandatory for proceeding under Section 68 of the Act.

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NOTE: (*) Asterisk denotes short notes

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION REGARDING REDUCTION OF STAMP DUTY CHARGEABLE UNDER ARTICLE 22 OF SCHEDULED 1-A OF THE INDIAN STAMP ACT, 1899

[Published in M.P. Rajpatra (Asadharan) dated 31-3-2011 Page 382.]

Notification No. B-4-08-2011-2-V-(10) dated the 31st March, 2011.– In exercise of the powers conferred by clause (a) of sub-section (1) of Section 9 of the **Indian Stamp Act, 1899 (No. II of 1899),** and in supersession of this Department's Notification No. (62) B-4-2-08-2-V dated 29th March, 2008, the State Government, hereby, reduces the stamp duty chargeable under Article 22 of Scheduled 1-A of the said Act on such instruments of conveyance including those executed in favour of females, so as to maintain it to five percent in case where it exceeds five percent.

2. This order shall come into force w.e.f. 1st April, 2011.

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NOTIFICATION REGARDING DATE OF ENFORCEMENT OF INDIAN STAMP (MADHYA PRADESH AMENDMENT) ACT, 2011

[Published in M.P. Rajpatra (Asadharan) dated 1-4-2011 Page 403.]

Notification No. B-4-06-2011-2-V (12) dated the 1st April, 2011. – In exercise of the powers conferred by sub-section (2) of Section 1 of the Indian Stamp (Madhya Pradesh Amendment) Act, 2011 (No. 8 of 2011), the State Government, hereby, appoints the 1st April, 2011 as the date on which the said Act shall come into force.

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Curiosity is one of the permanent and certain characteristics of a vigorous mind.

– SAMUEL JOHNSON

Success is the ability to go from one failure to another with no loss of enthusiasm.

– WINSTON CHURCHILL

Education is the ability to listen to almost anything without losing your temper or your self-confidence.

– ROBERT FROST

If you're willing to fail interestingly, you tend to succeed interestingly.

– EDWARD ALBEE